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Citation for published version:

Nic Shuibhne, N 2015, 'Limits rising, duties ascending: The changing legal shape of Union citizenship', *Common Market Law Review*, vol. 52, no. 4, pp. 889-937.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Common Market Law Review

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Limits rising, duties ascending: the changing legal shape of Union citizenship

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This article demonstrates that there has been a distinct shift towards the rising significance of conditions and limits, and a less explicit but discernible ascension of duties, in the application and interpretation of citizenship rights. Articles 20 and 21 TFEU provide for the restriction of rights by both primary and secondary law, but the extent to which this now occurs calls into question the existence, and not just the exercise, of the foundational primary rights. The article argues that there has been a hegemonic attribution of supremacy to secondary law that fails to engage the constitutional protocols epitomising the Union legal order more generally.

* School of Law, University of Edinburgh. An early version of this paper was presented at the iCourts Research Centre, University of Copenhagen in November 2014; thanks to the participants for comments, especially to Oddny Arnardottir and Urška Šadl. Thanks also to the CMLRev editors, and to Graeme Laurie, Tobias Lock, and Daniel Thym.

1. Introduction

Article 20 TFEU establishes that '[c]itizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties'. But it also stipulates that such rights 'shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'. Similarly, while Article 21 TFEU confers the right to move and reside freely within the territory of the Member States on all Union citizens, it does so 'subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect'. Following these provisions, secondary law may therefore not only expound the scope and substance of primary rights; it can also *restrict* scope and substance – creating a potentially problematic circularity since secondary law must, in turn, be reviewed against the content of relevant primary rights. EU legislation has long addressed aspects of the right to move and reside, but Directive 2004/38¹ attracts particular significance because it was drafted – and is therefore being implemented, applied, and interpreted – after the conception of Union citizenship. But how far can the primary right to move and reside be conditioned and limited by secondary law; what are the duties that balance the rights of citizenship; and who gets to decide?

In *Grzelczyk*, the Court characterised citizenship as the 'fundamental status of nationals of the Member States'.² In *Huber*, AG Poiares Maduro argued that '[w]hen the Court describes Union citizenship as the "fundamental status" of nationals it is not making a political statement; it refers to Union citizenship as a *legal* concept which goes hand in hand with specific rights for Union citizens'.³ Building on that premise, Thym describes the concept as 'an overarching idea supporting status convergence by way of interpretative or legislative approximation of the diverse legal rules for the different categories of Union citizens'.⁴ His interpretation usefully

¹ Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, [2004] OJ L158/77.

² Case C-184/99 *Grzelczyk*, EU:C:2001:458, para. 31.

³ Opinion of AG Poiares Maduro in Case C-524/06 *Huber*, EU:C:2008:194, para. 19 (emphasis in original).

⁴ Thym, 'The elusive limits of solidarity: residence rights of and social benefits for economically inactive Union citizens' (2015) 52:1 CMLRev 17 at 18.

disentangles critical elements of free movement rights. There *are* different categories of Union citizen (e.g. mobile/static) and *diverse* rules apply to them. Codifying those rules is the basic purpose of the Directive, which establishes levels of rights linked to duration of residence in a host State. This ‘gradual system’⁵ has both temporal and material dimensions: it is constructed around significant time-points and important substantive differences are also relevant – depending, in particular, on whether citizens are economically active in the host State.

However, the impact of these distinctions is contained through recourse to an *overarching idea* with the aim of *status convergence*. While the convergence aim inherent in a ‘fundamental’ status might represent an ideological vision or aspiration – whether on the part of the Court of Justice or more generally, remembering that the phrase is also found in the preamble to the Directive – it has made a powerful contribution to the empirical development of citizenship rights. In particular, the Court instituted a framework at the level of primary law against which rules either directly targeting or indirectly revealing differences between categories of citizen had to be reviewed. Any differences identified between categories of citizen were often tempered as a result, an outcome justified by reference to the effectiveness of a citizenship status – of a Union – founded on equal treatment. In this way, drawing especially from the resource of proportionality, the Court managed to mediate the conferral of primary rights by the Treaty and their qualification through secondary law. Both ‘halves’ of the Article 21 TFEU equation were sustained. The Court has been criticised for extending both the idea and implications of Union citizenship too far in the foundational case law. However, it must be acknowledged that the Court created substantive rights at the level of primary law when it did so.

We have largely focused on the development of rights to debate whether a free movement paradigm that is truly citizen-distinctive has materialised in EU law. But reflecting more consciously on the *package* of concepts in Articles 20 and 21 TFEU, this article recasts the legal narrative by accenting conditions, limits, and duties instead. The argument that emerges has two key strands. First, there has been a profound shift in emphasis towards the rising significance of conditions and limits,

⁵ Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja*, EU:C:2011:866, para. 38.

and a less explicit but discernible ascension of duties, in the application and interpretation of citizenship rights. Second, the legal shape of citizenship is changing as a result. Constitutional choices have consequences, especially when they alter an established template for the protection of substantive primary rights. In some respects, exploiting conditions, limits, and duties is an uncontroversial mapping of the Directive.⁶ Judicial respect for legislative choices is a standard expectation, underscored by the wording of the Treaty. But it is argued here that the legal shape of citizenship has mutated beyond what the legitimate effecting of the ‘gradual system’ of rights actually requires. The basic constitutional instruction in Articles 20 and 21 TFEU is distorted too acutely when we also invert the starting-point from rights to restrictions. In essence, the primary-ness of Union citizenship rights has imploded. Crucially, it will also be shown that neither the adoption nor the coming into force (in 2006) of the Directive marks, as might be anticipated, the decisive point of change. First, the tipping point is more recent. Second, it will be demonstrated that the interpretative methods contributing to this generational case law shift outstrip *application* of the Directive, involving its *inflation* and *disruption* too.

As a result, notwithstanding the consolidation and simplification aims of Directive 2004/38,⁷ an amplified splintering of citizenship rights has occurred. Three distinct concerns are identified. First, both hardening and generalisation of conditions, limits, and duties are pervasive. Second, these steps are sometimes taken in disregard of the Treaty requirement that duties should be *provided for*, and limits and conditions should be *laid down*. Third, there has been a hegemonic attribution of supremacy to secondary law, which fails to engage the constitutional protocols epitomising the Union legal order more generally. The erosion of a proportionality-driven approach to resolving certain citizenship claims exemplifies the latter point.

In Section 2, the conventional legal narrative on conditions, limits, and duties is briefly outlined. The dominance of rights over limits – and of primary law and general principles over secondary law – distinguishes this formative case law from the account characterised by mutation presented in more detail in Section 3. Three

⁶ See e.g. *Ziolkowski and Szeja*, paras 39-41; Case C-333/13 *Dano*, EU:C:2014:2358, paras 70-73.

⁷ See recitals 3 (‘to simplify’) and 4 (‘remedying this sector-by-sector, piecemeal approach to the right of free movement and residence’) of the preamble.

clusters of cases – on social assistance, permanent residence, and protection against expulsion – are analysed to demonstrate the scale of the shift. In Section 4, the idea of the ‘tolerated’ citizen is then used to convey the reduced status of and support for citizens seeking to transition between the calcifying tiers of citizenship.

Overall, recent case law raises questions about the extent to which the *existence* and not just the *exercise* of free movement rights has been undermined and, therefore, whether the claim of Union citizenship as a fundamental status grounded in meaningful primary rights can really be sustained.

2. Convention: the orthodox approach to conditions, limits, and duties

At the time of its inception, three sets of conditions and limits restricted the movement and residence rights of Union citizens. First, the Treaty provided Member States with authority to refuse admission to or expel Union citizens on grounds of public policy, public security, and public health.⁸ States were always compelled to construe these derogations narrowly⁹ but ‘a *particularly restrictive* interpretation...is required by virtue of a person’s status as a citizen of the Union’.¹⁰ Second, various interpretative limits were created through case law. For example, hypothetical restrictions on¹¹ or abuse of free movement rights,¹² or situations all the elements of which are purely internal to one Member State,¹³ would not engage the application of the Treaty. Union citizenship did not¹⁴ (or did not initially¹⁵) unsettle the impact of

⁸ Articles 45(3) (workers), 52(1) (establishment) and 61 (services) TFEU; developed in Council Directive 64/221/EEC on the co-ordination of special measures concerning the movement and residence of foreign nationals which are justified on grounds of public policy, public security or public health (1964 OJ L56/850, repealed and replaced by Directive 2004/38).

⁹ E.g. Case 36/75 *Rutili*, EU:C:1975:137, para. 27.

¹⁰ Joined Cases C-482/01 and C-493/01 *Orfanopoulos and Oliveri*, EU:C:2004:262 para. 65 (emphasis added).

¹¹ E.g. Case 180/83 *Moser*, [1984] ECR 2539, para. 18.

¹² E.g. Case C-370/90 *Singh*, EU:C:1992:296, para. 24.

¹³ E.g. Case 115/78 *Knoors*, EU:C:1979:31, para. 24.

¹⁴ E.g. Case C-299/95 *Kremzow*, EU:C:1997:254, para. 16 (hypothetical restrictions).

¹⁵ E.g. Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet*, EU:C:1997:285, para. 23 (internal situations).

these ‘exclusionary rules’,¹⁶ with the exception of the piercing of the purely internal barrier in situations where national measures deprive individuals of the genuine enjoyment of the substance of rights conferred by Union citizenship.¹⁷

Finally, two discrete legislative conditions come from pre-citizenship directives that conferred free movement rights for purposes other than economic activity, requiring a mobile Member State national to have (covering his/her family members where relevant): (1) sickness insurance in respect of all risks in the host State, and (2) sufficient resources not to become a burden on its social assistance system.¹⁸ The sufficient resources requirement, in particular, has left an enduring imprint on citizenship law. It was not imposed on the economically active,¹⁹ but those claiming residence rights in a host State to *find* employment – i.e. jobseekers – had to satisfy bespoke tests established in case law: that they (1) were actively looking for work, and (2) had a genuine chance of being engaged.²⁰

2.1. Conditions and limits post-citizenship

Early statements on the nature of Union citizenship isolated a new dimension of free movement rights at the level of primary law, loosened from the requirement of economic activity²¹ and reflecting a surge in expectations of equal treatment.²² The framework that the Court developed for reviewing the compatibility of conditions and limits with the rights articulated in that context is traced here in three stages: first, case law on the 1990s Directives that came after the creation of citizenship;

¹⁶ Horsley, ‘Unearthing buried treasure: Article 34 TFEU and the exclusionary rules’ (2012) 37:6 ELRev 734.

¹⁷ Case C-34/09 *Ruiz Zambrano*, EU:C:2011:124 (forced departure from the territory of the Union; Case C-135/08 *Rottmann*, EU:C:2010:104 (loss of Member State nationality).

¹⁸ Article 1 of Council Directive 90/364/EEC on the right of residence (1990 OJ L180/26); Article 1 of Council Directive 90/365/EEC on the right of residence for employees and self-employed persons who have ceased their occupational activity (1990 OJ L180/28); and Article 1 of Council Directive 93/96/EEC on the right of residence for students (1993 OJ L317/59) – though students were only required to make a declaration that the conditions were satisfied.

¹⁹ Continuing the logic of e.g. Case 139/85 *Kempf*, EU:C:1986:223.

²⁰ Case C-292/89 *Antonissen*, EU:C:1991:80.

²¹ E.g. Opinion of AG Ruiz-Jarabo Colomer in Case C-65/95 *Shingara*, EU:C:1996:451, para. 34; Opinion of AG Cosmas in Case C-378/97 *Wijsenbeek*, EU:C:1999:144, paras 83-85.

²² E.g. Opinion of AG Jacobs in Case C-274/96 *Bickel and Franz*, EU:C:1998:115, paras 23-24.

second, the process of adopting Directive 2004/38; and, third, initial responses to the Directive in the case law.

2.1.1. Citizenship ‘versus’ conditions and limits: the formative case law

Three judgments in particular produced the conventional framework for review of conditions and limits (*Martínez Sala*, *Grzelczyk*, and *Baumbast*), comprising five key elements: (1) conditions and limits *expressly provided for*²³ will be assessed against (2) *directly effective*²⁴ (3) *primary rights*,²⁵ requiring (4) *individual-centred assessments*²⁶ that respect the (5) *general principles of EU law*, especially *equal treatment* and *proportionality*.²⁷ This template also reflects a legally significant distinction between the *existence* of primary rights – which could not be regulated by secondary law – and their *exercise*, which could.²⁸ The wording of the Treaty was not ignored, and the legitimate function of secondary law was recognised. But the constitutional imprint of primary norms and of the wider system of EU law was also accommodated.

A critical implication of this approach was that citizens tended to win their cases. The Court did acknowledge that conditions and limits reflect ‘the idea that the exercise of the right of residence...can be subordinated to the legitimate interests of the Member States’.²⁹ In particular, it challenged States to confront the fact that it was within their discretion to expel citizens who became an *unreasonable* drain on resources.³⁰ But the Court also ensured that such decisions were taken within the

²³ *Grzelczyk*, n2 above, para. 31; reaffirmed in e.g. Case C-224/98 *D’Hoop*, EU:C:2002:432, para. 28, Case C-148/02 *Garcia Avello*, EU:C:2003:539, para. 23, and Case C-200/02 *Zhu and Chen*, EU:C:2004:639, para. 30. See also, Opinion of AG Tizzano in *Zhu and Chen*, EU:C:2004:307, para. 74, characterising the Directive as a ‘measure which limits the exercise of a fundamental right...There is therefore no question of stretching its text so far as to incorporate in it a condition not expressly laid down’.

²⁴ Case C-413/99 *Baumbast*, EU:C:2002:493, paras 84-86.

²⁵ E.g. distinguishing free movement rights under Articles 21 and 45 TFEU, Case C-85/96 *Martínez Sala*, EU:C:1998:217, paras 60-63; see similarly, Case C-456/02 *Trojani* EU:C:2004:488, para. 46.

²⁶ *Grzelczyk*, para. 44.

²⁷ *Baumbast*, para. 91.

²⁸ This reasoning stems from the Opinion of AG La Pergola in *Martínez Sala*, EU:C:1997:335, para. 18.

²⁹ *Baumbast*, para. 90.

³⁰ Based on the finite ‘*certain degree of financial solidarity*’ that nationals of the Member States were judged to share; see *Grzelczyk*, paras 42-44 (emphasis added).

protective requirements of EU law. And if States chose not to take that step, the principle of non-discrimination opened up their resources to Union citizens authorised to reside there, fuelling the transition of these citizens to new and better times. However, the attendant privileging of the libertarian aspirations of individuals, with little reflection on the systemic consequences for host State resources or societies, raised serious questions about forcing the reach of transnational solidarity. Indications that the beginning and end of conditions and limits might not sit exclusively in the express terms of legislation can also be found.³¹

2.1.2. Directive 2004/38

The process of drafting a new Directive provided the legislature with an opportunity to re-regulate free movement rights within the ‘new legal and political environment’ constituted by citizenship.³² Setting up the clusters of cases examined in Section 3, the discussion here tracks the enactment of three sets of conditions and limits: conditions attached to permanent residence; the reshaped framework on protection against expulsion; and the requirement to have sufficient resources.

It was originally proposed by the Commission that Union citizens could reside in other States without any formalities for up to six months;³³ that they could acquire a right of permanent residence after four years (and lose it only after a period of absence exceeding four consecutive years); and that citizens (and family members) who had that right would gain absolute protection from expulsion.³⁴ Responses from the other institutions required further conditions to be attached to permanent residence. In particular, the European Parliament proposed the condition of *legal* as well as *continuous* residence in a host State now enacted in Article 16(1) of the

³¹ E.g. *Zhu and Chen*, para. 20: ‘it does not follow either from the terms of, or from the aims pursued by, Articles 18 EC and 49 EC and Directives 73/148 and 90/364 that the enjoyment of the rights with which those provisions are concerned should be made conditional upon the attainment of a minimum age’ (emphasis added).

³² Para. 1.3 of the Commission’s original proposal for the Directive (COM(2001) 257); see similarly, para. 1 of the amended proposal (COM(2003) 199 final).

³³ Later reduced to three months by the Council; see Statement of the Council’s Reasons in Common Position (EC) No 6/2004 of 5 December 2003 (2004 OJ C54E/12).

³⁴ COM(2001) 257, especially at paras 1.4, 2.2 and 2.3, and the ‘comments’ on draft Articles 14 and 26 in the same document.

Directive. But neither the reasoning behind the amendment nor its intended meaning was explained.³⁵ Additionally, the Council was ‘almost unanimously against the absolute protection against expulsion, although it has accepted an increased protection for Union citizens who have been residing for a long period in the host Member State’.³⁶ On that basis, the incremental framework for protection against expulsion now outlined in Article 28 of the Directive was introduced.

It was plainly intended that economically inactive citizens would still be required to have sufficient resources and sickness insurance. The Commission reconciled the retention of these conditions with the facilitation and strengthening of rights intended by the Directive on the grounds that since ‘social assistance provision is not covered by [Union] law and is not, as a rule, “exportable”, complete equal treatment as regards social security benefits is not possible without running the risk of certain categories of people entitled to the right of residence, in particular those not engaged in gainful activity, becoming an undue burden on public funds in the host Member State’.³⁷ The first draft of what became Article 7(1)(b)³⁸ therefore sought to preserve the balance recognised in *Baumbast* between the *fundamental* nature of free movement rights and the *legitimate* interests of Member States. The concept of unreasonable burden emphasised in *Grzelczyk* was retained in the Directive’s

³⁵ European Parliament report from 23 January 2003 on the proposal for a European Parliament and Council directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, A5-0009/2003, Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs, at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A5-2003-0009+0+DOC+XML+V0//EN>. The Council changed the condition from four to five years for acquiring permanent residence, and to absence for two years regarding its loss; see C/03/259, Brussels, 22 September 2003, 12339/03 (Presse 259) 2525th Council meeting - Competitiveness - Internal market, industry and research, Brussels, 22 September 2003, at http://europa.eu/rapid/press-release_PRES-03-259_en.htm?locale=en.

³⁶ Statement of the Council’s Reasons, n33 above.

³⁷ COM(2001) 257, comment on draft Article 7. Not everyone agreed, noting *inter alia* the constitutional implications of Union citizenship; see e.g. Opinion of the Committee on Legal Affairs and the Internal Market in the European Parliament report, n35 above.

³⁸ I.e. to ‘have sufficient resources for themselves and for their family members to avoid becoming a burden on the social assistance system of the host Member State during their stay and that they have sickness insurance covering all risks in the host Member State’. The adopted version reads: ‘not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State’.

preamble³⁹ (and in Article 14(1) for residence rights up to three months), but ‘unreasonable’ was detached from the ‘burden’ condition regulating residence for more than three months in Article 7(1)(b) – providing an example of internal tensions across different parts of the Directive, a point returned to in Section 3.

It is interesting that the phrasing of the (adopted) German language version of the Directive is different, requiring that Union citizens should have sufficient resources ‘without recourse to welfare funds in the host Member State during their stay’. That formulation is stricter than the notion of burden and does not fit with the broader scheme of the Directive.⁴⁰ But it is a more definitive test. It would be easier to apply in practice. It also aligns with the original draft of Article 24. The Commission acknowledged the ‘direct link between the principle of non-discrimination and the right of residence’ established in *Martínez Sala*, but recalled that ‘Article 7 clearly stipulates that people not working must have sufficient resources and sickness insurance, and by consequence having recourse to public funds may challenge his right of residence’.⁴¹ It therefore proposed the following text:

- (1) All EU citizens residing on the territory of the host Member State shall enjoy equal treatment with the nationals of that country within the scope of the Treaty. ...
- (2) By way of derogation from paragraph 1, *until they have acquired the right of permanent residence, the host Member State shall not be obliged to confer entitlement to social assistance on persons other than those engaged in gainful activity in an employed or self-employed capacity or the members of their families, nor shall it be obliged to award maintenance grants to persons having the right of residence who have come to the country to study [emphasis added].*

Draft paragraph (1) was a more open statement on equal treatment than Article 24(1) as adopted.⁴² The Council was responsible for the addition that equal treatment is

³⁹ A fact of which the Member States were clearly aware: see Statement of the Council’s Reasons, n33 above, where the Council considers that its proposed text for recital 16 would provide a ‘useful indication for the criteria to follow in order to establish if a person has become an unreasonable burden’.

⁴⁰ Opinion of AG Wahl in Case C-140/12 *Brey*, EU:C:2013:337, paras 74-77, pointing to Articles 8(4), 14(2) and Article 14(3), as well as recitals 10 and 16 of the preamble.

⁴¹ COM(2001) 257, comment on draft Article 21.

⁴² ‘Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the

‘[s]ubject to such specific provisions as are expressly provided for in the Treaty *and secondary law*’ – the slowly dawning potency of which unfolds in Section 3.1 below – but provided no comment on the motivation behind or intended scope of its late-stage amendment.⁴³ Draft paragraph (2) was a more generalised refuting of *Martínez Sala* and *Grzelczyk* – as the Commission explicitly noted in its revised proposal.⁴⁴ In its Communication on the Council’s Common Position, the Commission indicated that the altered version of Article 24(2) ‘*was designed to remove the provision that persons not engaged in gainful activity are not entitled to social assistance until they have acquired the right of permanent residence. The Council has accepted this amendment, but added that Union citizens may be refused entitlement to social assistance during the first three months of their stay*’.⁴⁵ Article 24(2) of Directive 2004/38 was not, therefore, intended to displace the fundamental nature of equal treatment applied in case law. In fact, the strictness of the original draft underscores the permissiveness of the adopted text – the derogations in which are narrowly targeted in scope, from temporal (no obligation to confer entitlement to social assistance for the first three months *only*) and material (limits for jobseekers and students *only*) perspectives. But this overview of the Directive’s drafting history reveals a measure striving to reconcile contrasting ambitions and preferences – and not altogether successfully.

host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty’.

⁴³ Statement of the Council’s Reasons, n33 above. Article 24(2) as adopted provides: ‘By way of derogation from paragraph 1, the host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families’.

⁴⁴ COM(2003) 199 final, explanatory memorandum: ‘the aim here is to eliminate exclusion from welfare assistance for persons not engaged in gainful activity before they acquire permanent right of residence. This restriction is not contained in the Directives concerning right of residence for those not in gainful activity. It could be interpreted as retrogressive in relation to the current *acquis*, notably in the light of the case-law of the Court of Justice’.

⁴⁵ Communication from the Commission to the European Parliament concerning the common position of the Council on the adoption of a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, SEC/2003/1293 final – COD 2001/0111 (emphasis added). The amendments that shaped the adopted text came largely from the European Parliament’s report, n35 above.

2.1.3. Adapting to Directive 2004/38 in the case law

A first testing of the more complicated legislative framework on conditions and limits came in *Förster*, where the Court accepted a five-year residence rule limiting entitlement to student maintenance.⁴⁶ Directive 2004/38 was not applicable to the facts, but the Court acknowledged the specific reference to maintenance grants in Article 24(2) when assessing the proportionality of the national measure. However, Article 24(2) unambiguously limits entitlement to maintenance grants for students. The same cannot be said for social assistance generally. In that light, AG Mazák commented that the Directive ‘cannot detract from the requirements flowing from Article [18 TFEU] and the general principle of proportionality’.⁴⁷ In other words, conditions and limits may *affect* but do not *comprise* the content of primary rights.

The judgment in *Metock*, delivered four months previously, underscores the extent to which *Förster* was an isolated departure from the prevailing approach. In 2003, the Court had ruled in *Akrich* that the third country national spouse of a Union citizen ‘must be lawfully resident in a Member State when he moves to another Member State to which the citizen of the Union is migrating or has migrated’ in order to benefit from derived residence rights under Article 10 of Regulation 1612/68.⁴⁸ However, the adoption of Directive 2004/38, the relevant provisions of which replaced Article 10 of the Regulation, required the decision in *Akrich* to be ‘reconsidered’.⁴⁹ Applying *Grzelczyk*, the Court stated in *Metock* that ‘no provision of Directive 2004/38 makes [its] application...conditional on...having previously resided in a Member State’.⁵⁰ Addressing a different question – whether when or where a marriage took place was a relevant factor – the reasoning of the Court again reflects the conventional method developed before the adoption of the Directive i.e. its provisions should not be interpreted restrictively (para. 84); and conditions and

⁴⁶ Case C-158/07 *Förster*, EU:C:2008:630, especially paras 52-58. See generally, S O’Leary, ‘Equal treatment and EU citizens: A new chapter on cross-border educational mobility and access to student financial assistance’ (2009) 34:4 ELRev 612.

⁴⁷ Opinion of AG Mazák in *Förster*, EU:C:2008:399, para. 131.

⁴⁸ Case C-109/01 *Akrich*, EU:C:2003:491, para. 50.

⁴⁹ Case C-127/08 *Metock*, EU:C:2008:449, para. 58.

⁵⁰ *Metock*, para. 49; see also, paras 51 and 53.

limits have to be provided for to constitute legitimate restrictions on free movement rights (para. 87) because of the latter's fundamental nature (para. 89).

The Court was perfectly aware of the views of the Member States in *Metock* – ten of which in addition to Ireland (the Government directly involved) submitted observations presaging current debates: ‘in a context *typified by strong pressure of migration*, it is necessary to control immigration at the external borders of the [Union], which presupposes an individual examination of all the circumstances surrounding a first entry into Community territory’.⁵¹ The Court responded by pointing out that EU rights are not unlimited and States could engage the opportunities for migration control already built into the system of the Directive (noting e.g. Article 35 on preventing abuse of rights); and reminding the Member States that all of them are parties to the ECHR, Article 8 of which protects the right to respect for family life.⁵²

In its 2010 judgment in *Lassal* – addressing whether or not periods of residence in a host State before the coming into force of Directive 2004/38 could later count towards establishing permanent residence – the Court again prioritised the primary and individual nature of the right to move and reside (citing *Baumbast*); referred to the ‘reaffirmation’ of that interpretation in Article 45 of the Charter; and emphasised the rights-strengthening ‘in particular’ aim of the Directive (citing *Metock*).⁵³ On the right of permanent residence specifically, referring to recital 17 of the Directive, the Court ruled that ‘the objectives and purpose of [permanent residence] to promote social cohesion and to strengthen the feeling of Union citizenship, would be seriously compromised if that right of residence was refused to citizens of the European Union who had legally resided in the host Member State for a continuous period of five years completed before 30 April 2006, on the sole ground that there had been temporary absence of less than two consecutive years subsequent to that period but before that same date’.⁵⁴ A gap in the Directive was thereby filled with established principles affirming the fundamental nature of free movement rights, since the main purpose of the Directive was to facilitate and strengthen them.

⁵¹ *Metock*, para. 71 (emphasis added).

⁵² *Metock*, paras 73-79.

⁵³ Case C-162/09 *Lassal*, EU:C:2010:592, paras 29-31.

⁵⁴ *Lassal*, para. 53.

2.2. A note on duties

The duty dimension of citizenship has a very different history to the denser framework on conditions and limits outlined above. Article 20(2) TFEU provides that Union citizens ‘shall enjoy the rights and be subject to the duties provided for in the Treaties’. But it has never been clear – even with a basic consensus in the literature that duties are or should be an important element of citizenship rights generally⁵⁵ – what these duties actually are. Additionally, while the Treaty confers competence on the legislature in the field of citizenship, it is to facilitate the *exercise of the right* to move and reside (Article 21(2) TFEU) or to ‘strengthen or to add to *the rights* listed in Article 20(2)’ (Article 25 TFEU). While unwritten citizenship rights have emerged through case law,⁵⁶ the relative state of inertia on the uncovering of unwritten duties is the probable impetus behind Kochenov’s challenging assertion that ‘duties of EU citizenship only exist as one word in the Treaty, which does not happen to correspond to anything in either contemporary legal theory or in practice’.⁵⁷

Kochenov’s thesis has both normative and empirical dimensions, and his normative concerns go beyond the make-up of Union citizenship only.⁵⁸ However, addressing his claim on the role of duties in *practice*, a distinction could perhaps be drawn between *formal* duties ‘provided for in the Treaties’ – of which there has indeed been virtually no discussion or development in Union citizenship law – and *implied* duties i.e. what emerges when we reverse expressions of conditions or limits as instances of obligation or responsibility: for example, the *condition* to have sufficient resources expressed instead as an *obligation or responsibility* to have them.

⁵⁵ E.g. Shaw ‘Citizenship of the Union: towards post-national membership’, Jean Monnet Working Paper 6/97, at <http://www.jeanmonnetprogram.org/archive/papers/97/97-06-.html>; Weiler, ‘To be a European citizen: Eros and civilization’ in Weiler, *The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration* (Cambridge University Press, 1999); Davis, ‘Citizenship of the Union ... rights for all?’ (2002) 27:1 ELRev 121; Besson and Utzinger ‘Introduction: future challenges of European citizenship—facing a wide-open Pandora’s box’ (2007) 13:5 ELJ 573; and Kostakopoulou, ‘European citizenship rights and duties: civil, political and social’, Warwick School of Law, Legal Studies Paper No 2013/25, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2316819.

⁵⁶ Notably, the right not to be forced from the territory of the Union in *Ruiz Zambrano*.

⁵⁷ Kochenov, ‘EU citizenship without duties’ (2014) 20:4 ELJ 482 at 483, and 485.

⁵⁸ Cf. Bellamy, ‘A duty free Europe? What’s wrong with Kochenov’s account of EU citizenship rights’ (2015) 21 ELJ (forthcoming).

This shift in discourse and its implications for the interpretation of citizenship is evident in citizenship law more recently. For present purposes, however, these implied duties can be treated as a variant of conditions and limits in functional terms.

Kochenov also espouses an important premise of *legitimate* duties: '[i]t is crucial to see which duties are *set out in the law* in order to understand the role they play in the legal system'.⁵⁹ But the ascension of implied citizenship duties in EU law has tended to occur, as will be shown in Section 3, without adherence to what is *provided for*, even in secondary law. Kochenov adds another cautionary note with his remark that 'the main function of citizenship duties in the past was an *exclusionary* one: duties were relied upon to outline second-class citizens...in order to justify their full exclusion from the actual benefits that the legal status of citizenship which they formally possessed was supposed to provide to "everyone"'.⁶⁰ Arguably, this exclusionary inclination of duties, which re-institutes the borders of the State and entrenches the pull of nationality, remains a feature of contemporary Union citizenship more than anyone thought it still would.

3. Mutation: the changing legal shape of citizenship

In March 2011, building on the injection of EU law into national decisions on the withdrawal of Member State nationality in *Rottmann*, the ruling in *Ruiz Zambrano* engaged citizenship rights in a situation purely internal to one State. However, the qualification that *Ruiz Zambrano* rights apply only in 'exceptional circumstances'⁶¹ quickly followed.⁶² The fact that several States have more circumspect expectations of citizenship was obvious from submissions to the Court over many years. But rulings like *Metock* demonstrate that such views were not a decisive influence on the direction of the case law – accentuating all the more both the fact that and the speed

⁵⁹ Kochenov, n57 above, 485 (emphasis added).

⁶⁰ Ibid 489-490 (emphasis added).

⁶¹ Case C-256/11 *Dereci*, EU:C:2011:734, para. 55.

⁶² E.g. Case C-434/09 *McCarthy*, EU:C:2011:277; *Dereci*; Case C40/11 *Iida*, EU:C:2012:691; Joined Cases C-356/11 and C-357/11 *O and S*, EU:C:2012:776; and Case C-86/12 *Alokpa*, EU:C:2013:645.

with which the Court exceeded the referring court's questions in *McCarthy*⁶³ to contain the implications of the *Ruiz Zambrano* judgment just two months earlier – especially since translation logistics would suggest that the qualification included in the *McCarthy* judgment must have been a very late-stage addition to its text.

Judgments are constructed through the making of deliberate choices,⁶⁴ which then set up the success or failure of the citizen's claim as well the context in which we contemplate the rightness of the decision. Case law trends also ebb and flow – expansive decisions follow restrictive decisions; and vice versa. However, it is argued here that *McCarthy* exhibits the beginnings of a more wide-scale and sustained recent shift from *predominantly* rights-opening to *predominantly* rights-curbing assessments of citizenship rights. The intensity of academic but also political reaction to *Ruiz Zambrano* is an important factor internal to citizenship law when thinking about motivations that may have produced this shift.⁶⁵ The persistence of the Eurozone crisis and disillusionment with the austerity strategy applied in response sharpen external questions about the legitimate locus of control over public spending. Notably, States worked outside the boundaries of the existing Treaties to advance their preferred plan of action – diluting the supervisory capacity of the EU institutions. Withdrawal from the Union altogether has become a serious prospect for the UK, a central plank of which concerns perceived abuse of free movement. The sum of these wider contextual parts could well have induced the systemic spasm that has profoundly altered the legal trajectory of citizenship.⁶⁶

⁶³ '[E]ven though, formally, the national court has limited its questions to the interpretation of Articles 3(1) and 16 of Directive 2004/38, such a situation does not prevent the Court from providing the national court with all the elements of interpretation of European Union law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the question' (*McCarthy*, para. 24).

⁶⁴ See generally, Sadl, 'Case – case-law – law: *Ruiz Zambrano* as an illustration of how the Court of Justice of the European Union constructs its legal arguments' (2013) 9:2 *EuConst* 205.

⁶⁵ E.g. Hailbronner and Thym, comment on *Ruiz Zambrano* (2011) 48:4 *CMLRev* 1253; Kochenov, 'EU citizenship: from an incipient form to an incipient substance?' (2012) 37:3 *ELRev* 369; van Eijken and de Vries, 'A new route into the Promised Land? Being a European citizen after *Ruiz Zambrano*' (2011) 36:5 *ELRev* 704; Wollenschläger, 'A new fundamental freedom beyond market integration: Union citizenship and its dynamics for shifting the economic paradigm of European integration', (2011) 17:1 *ELJ* 34.

⁶⁶ See Amtenbrink, 'Europe in times of economic crisis: Bringing Europe's citizens closer to one another?' in Dougan, Nic Shuibhne, and Spaventa (eds.), *Empowerment and*

This generational case law shift is, of course, partly connected simply to the coming into force of the Directive, and to related analyses of the roles of the legislature and the judiciary respectively.⁶⁷ But it is not adequately captured or explained by it. More cases on Directive 2004/38 naturally reached the Court over time, presenting it with further opportunities to bring out the nuances of the measure – including the restrictive provisions. But the Directive was not the game-changer. Several points support this claim, in turn supporting the argument that the reasons for change lie also in the wider context outlined above. First, both *Ruiz Zambrano* and the cases that limited its impact soon afterwards were about *Treaty* rights and not legislative provisions. Second, the cardinal condition of sufficient resources pre-exists the Directive. Third, the ‘new legal and political environment’ that shaped the adoption of Directive 2004/38 was initially reflected through emphasising its objective of facilitating and strengthening free movement rights. In *McCarthy*, however, the Court framed the purpose of the measure very differently:

[W]hilst it is true that...Directive 2004/38 aims to facilitate and strengthen the exercise of the primary and individual right to move and reside freely within the territory of the Member States that is conferred directly on each citizen of the Union, the fact remains that *the subject of the directive concerns, as is apparent from Article 1(a), the conditions governing the exercise of that right*.⁶⁸

Finally, it will be shown that the methods applied in recent case law are not confined to application of the Directive (Section 3.1 on access to social assistance). There is also

Disempowerment of the European Citizen (Hart Publishing, 2012) 171; Azoulai, ‘The(mis)construction of the European individual – two essays on Union citizenship law’, EUI working papers, LAW 2014/14, at http://cadmus.eui.eu/bitstream/handle/1814/33293/LAW_WP_%202014_14.pdf?sequence=1, 2-3 and 17; Kostakopoulou, ‘When EU citizens become foreigners’ (2014) 20:4 ELJ 447 at 458; Thym, n4 supra, 20-21; and Spaventa, ‘Earned citizenship – understanding Union citizenship through its scope’ in Kochenov (ed.) *Citizenship and Federalism in Europe: The Role of Rights*, (CUP, forthcoming 2015).

⁶⁷ See further, Hailbronner, ‘Union citizenship and access to social benefits’ (2005) 42:5 CMLRev 1245; Dougan, ‘Judicial activism or constitutional interaction? Policymaking by the ECJ in the field of Union citizenship’ in Micklitz and de Witte (eds.), *The European Court of Justice and the Autonomy of the Member States* (Intersentia, 2012) 113.

⁶⁸ *McCarthy*, n62 above, para. 33 (emphasis added); repeated in e.g. Case C-456/12 O, EU:C:2014:135, para. 41; see further, the discussion on *Brey* in Section 3.1.1.

inflation of conditions and limits (Section 3.2 on permanent residence) and even disruption of the intention of the legislature (Section 3.3 on expulsion).

3.1. *Application: equal treatment and access to social assistance*

We saw in Section 2.1.2 that the legislature rejected a harder but cleaner approach to social assistance when adopting Directive 2004/38: for the first five years of residence, draft Article 24(2) ruled out entitlement through EU law for mobile citizens ‘other than those engaged in gainful activity in an employed or self-employed capacity’ in a host State. In the end, the limiting of such entitlement was linked to the first three months of residence, with further restrictions addressing jobseekers and maintenance aid for students only. But it was also noted that the scheme of the Directive transmits mixed messages⁶⁹ – the requirement that mobile citizens should have sufficient resources alongside the implication that *reasonable* burdens on host State resources are tolerated; or the option of expelling citizens not meeting the conditions in Article 7(1) while providing that such decisions must not be an *automatic* consequence of recourse to social assistance. Overall, neither the nature nor extent of host State obligations is clearly delineated in the Directive.⁷⁰ Four particular complications can be noted for present purposes. First, as shown in Section 2.1.2, the Commission did not consider that the Directive usurped how equal treatment was managed as a *primary* right in the formative case law. In particular, Union citizens authorised to reside in a host State *should* therefore remain entitled to the same social assistance provision as nationals of that State.⁷¹ Second, no provisions of the Directive appeared to preclude the individual-centred assessments required by

⁶⁹ In Thym’s view, ‘the EU legislature had opted for deliberate ambiguity when drafting the free movement rules’ (n4 above, 26).

⁷⁰ See generally, Menéndez, ‘European citizenship after *Martínez Sala* and *Baumbast*: has European law become more human but less social?’ ARENA Working Paper 11/2009, at http://www.sv.uio.no/arena/english/research/publications/arena-publications/workingpapers/working-papers2009/WP11_09_Online.pdf; Oršolić Dalessio, ‘The social dimension of EU citizenship – a castle in the air or construction gone wrong?’ (2013) 14:7 *German Law Journal* 869; and de Witte, ‘Transnational solidarity and the mediation of conflicts of justice in Europe’ (2012) 18:5 *ELJ* 694.

⁷¹ On this point, see AG Geelhoed in *Bidar*, EU:C:2004:715, para. 32.

proportionality. Third, while ‘real link’ methods developed to determine eligibility for student maintenance aid in *Bidar* were superseded by the wording of Article 24(2),⁷² they still apply in other circumstances and especially when evaluating the proportionality of restrictions placed on *exporting* benefits.⁷³

Fourth, a discrete version of the real link test was developed for jobseekers. In *Collins*, the Court ruled that ‘[i]n view of the establishment of citizenship...it is no longer possible to exclude from the scope of Article [45 TFEU] – which expresses the fundamental principle of equal treatment, guaranteed by Article [18] of the Treaty – a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State’.⁷⁴ However, it was legitimate for States to limit entitlement to situations where ‘a genuine link exists between the person seeking work and the employment market of that State’ by the application of a (proportionate) residence test.⁷⁵ In *Vatsouras and Koupatantze*, the Court was asked whether the preclusion of entitlement to social assistance for jobseekers in Article 24(2) of the Directive called the constitutionality of that provision into question vis-à-vis rights conferred by Articles 18 and 45 TFEU. The Court avoided substantive discussion of the problem by stating without further explanation that ‘[b]enefits of a financial nature which...are intended to facilitate access to the labour market cannot be regarded as constituting “social assistance” within the meaning of Article 24(2)’.⁷⁶ That response further underpins the argument that Directive 2004/38 was not the definitive game-changer since, ironically, jobseekers are one of the few categories of citizen *explicitly* excluded from entitlement to social assistance by its provisions.

3.1.1. Continuity: Brey

The framework emerging from the points summarised above was – building on the *Martínez Sala/Grzelczyk/Baumbast* template – extra-Directive. Crucially, however, the

⁷² Case C-209/03 *Bidar*, EU:C:2005:169, especially paras 56-59.

⁷³ E.g. Joined Cases C-11/06 and C-12/06 *Morgan and Bucher*, EU:C:2007:626; Case C-192/05 *Case C-499/06 Nerkowska*, EU:C:2008:300; Case C-220/12 *Thiele Meneses*, EU:C:2013:683; Case C-359/13 *Martens*, EU:C:2015:118.

⁷⁴ Case C-138/02 *Collins*, EU:C:2004:172, para. 63. In his Opinion, AG Ruiz-Jarabo Colomer linked legitimate residence conditions to curbing benefit tourism (EU:C:2003:409, para. 75).

⁷⁵ *Collins*, para. 69.

⁷⁶ Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze*, EU:C:2009:344, para. 45.

Court's tendency to take this broader approach initially persisted, as demonstrated by the 2013 judgment in *Brey*. A first concern was whether the supplementary allowance applied for in this case was a special non-contributory benefit under Regulation 883/2004.⁷⁷ The Court ruled that even where a benefit falls within the scope of the Regulation (as the allowance here did), the concept of 'social assistance' governing entitlement to benefits – i.e. linked to the condition in Article 7(1)(b) of the Directive that an economically inactive citizen should not become a burden on the host State social assistance system – is autonomous. For that purpose, the Court defined it as 'all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted'.⁷⁸ It emphasised that the Regulation and the Directive pursued different objectives, and repeated its narrowed *McCarthy* framing of the latter.⁷⁹ It also affirmed that 'the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present case, the protection of their public finances'.⁸⁰

However, while it was stated that the Directive 'allows the host Member State to impose *legitimate* restrictions in connection with the grant of such benefits to Union citizens who do not or no longer have worker status',⁸¹ the Court also invoked the protective requirements of the formative case law. In particular, recourse to social assistance *may* indicate the absence of sufficient resources, but 'competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the *specific burden* which granting that benefit would place on the national social assistance system as a whole, by reference to the *personal circumstances characterising the individual situation* of the person concerned'.⁸² The Court drew lines

⁷⁷ Regulation 883/2004/EC on the coordination of social security systems, 2004 OJ L166/1.

⁷⁸ *Brey*, EU:C:2013:565, para. 61.

⁷⁹ *Brey*, para. 53.

⁸⁰ *Brey*, para. 55; confirming e.g. *Zhu and Chen*, n23 above, para. 33.

⁸¹ *Brey*, para. 57 (emphasis added).

⁸² *Brey*, para. 64 (emphasis added); see further, paras 67-68.

directly back to *Grzelczyk* ('there is nothing in Directive 2004/38 to preclude nationals of other Member States from receiving social security benefits in the host Member State'⁸³) and *Baumbast* ('since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b)...must be construed narrowly...and in compliance with the limits imposed by EU law and the principle of proportionality'⁸⁴). Pulling away from the *McCarthy* framing statement, the Court here noted – reflecting *Metock* – that 'the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the *objective of Directive 2004/38*, which is, *inter alia*, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States'.⁸⁵

The final concerns of the Court are worth extracting at length, since they contrast sharply with the resolution of the *Dano* case by the Grand Chamber in 2014:

[I]t is clear from the explanation provided by the Austrian Government at the hearing that...the mere fact that a national of another Member State who is not economically active has applied for that benefit is sufficient to preclude that national from receiving it, *regardless of* the duration of residence, the amount of the benefit and the period for which it is available, that is to say, regardless of the burden which that benefit places on the host Member State's social assistance system as a whole. Such a mechanism, *whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit*, even for the period following the first three months of residence referred to in Article 24(2)...does not enable the competent authorities of the host Member State...to carry out – *in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality* – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned.⁸⁶

It is difficult to grasp in practical terms how national authorities could actually measure the 'specific burden [that] granting the benefit would place on the social

⁸³ *Brey*, para. 65. In contrast, AG Wahl applied a real link case law, 'leav[ing] Mr Brey without the compensatory supplement'; see paras 88-89 of the Opinion.

⁸⁴ *Brey*, para. 70.

⁸⁵ *Brey*, para. 71 (emphasis added).

⁸⁶ *Brey*, paras 76-77 (emphasis added).

assistance system *as a whole*', though the Court did note the Commission's suggestion 'to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State'.⁸⁷ The more extractable prescription concerns the factors that national authorities should take into account when assessing individual situations i.e. 'the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him'.⁸⁸ The appraisal of the specific circumstances of the applicant was therefore left to the referring court.

3.1.2. *Departure: Dano*

The judgment in *Brey* aimed to reconcile the primary rights of Union citizens with rising concern about control over public finances and a perception in some States that governments face increasing abuse of EU rights yet lack the power to deal with it. Interestingly, the Court grounded individual-centred assessments in Article 7(1)(b) of the Directive as well as in the principle of proportionality. But the efforts of the Third Chamber did not endure. The facts and context of *Dano* have been covered in detail in previous contributions to the *Review*.⁸⁹ The Court summarised the key questions referred as asking 'whether Article 18 TFEU, Article 20(2) TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are not economically active are excluded, in full or in part, from entitlement to certain "special non-contributory cash benefits" ...although those benefits are granted to nationals of the Member State concerned who are in the same situation'.⁹⁰ It repeated the definition of social assistance developed in *Brey*; recalled the fundamental status of Union citizenship and the prohibition in EU law on unjustified nationality discrimination; and observed that free movement rights are

⁸⁷ *Brey*, para. 78.

⁸⁸ *Ibid.*

⁸⁹ See Thym, n4 above; and Verschueren, 'Preventing "benefit tourism" in the EU: a narrow or broad interpretation of the possibilities offered by the ECJ in *Dano*?' (2015) 52:2 CMLRev 363.

⁹⁰ *Dano*, n6 above, para. 56.

conferred subject to compliance with the limitations and conditions laid down in the Treaties and in secondary law.⁹¹ Four facets of the analysis that then followed are assessed here: Article 24(1) as a limit on equal treatment; abuse of free movement rights; the shift from individual-centred assessments to generalised exclusion; and the relevance of the Charter.

The first issue concerns *equal treatment*. Although Ms Dano had been issued with residence ‘certificates’ in Germany – a point returned to in Section 4.2 – there was no discussion in the judgment of whether she was lawfully resident under national law, activating equal treatment rights under *Martínez Sala*, *Grzelczyk* and *Trojani*.⁹² Instead, the Court concentrated exclusively on Directive 2004/38. First, it stated that ‘the principle of non-discrimination, laid down generally in Article 18 TFEU, is *given more specific expression in Article 24 of Directive 2004/38...Accordingly*, the Court should interpret Article 24’.⁹³ However, since Ms Dano’s situation did not match any of the limits permitted by Article 24(2) – she had resided in Germany for more than three months, did not enter Germany to look for work, and was not currently looking for work – the Court considered instead, in a novel second step, whether *Article 24(1)* precluded ‘refusal to grant social benefits in a situation such as that at issue’.⁹⁴ The Court thereby poured the content of the primary right to equal treatment into a statement in secondary law. That method turns the standard approach to conditions and limits on its constitutional head – the latter no longer *temper* equal treatment rights; they *constitute* the rights.⁹⁵

The standard view of Article 24 before *Dano* was that ‘[s]ince *Article 24(2)* is a *derogation* from the principle of equal treatment provided for in Article 18 TFEU, of which *Article 24(1)* of Directive 2004/38 is merely a specific expression, it must be

⁹¹ *Dano*, paras 58-60.

⁹² Case law implicitly confirmed the previous year in Case C-45/12 *Hadj Ahmed*, EU:C:2013:390, paras 40-41.

⁹³ *Dano*, paras 61-62 (emphasis added).

⁹⁴ *Dano*, para. 67.

⁹⁵ See similarly, on the *Alokpa* case, Spaventa, n66 above: ‘The Directive...becomes floor and ceiling of rights – it is *the* standard; those oscillations that characterised the constituent phase of the case law, with its focus on the individual, are no longer there’ (emphasis in original).

interpreted narrowly'.⁹⁶ It is fair criticism in many respects that 'judicial interpretation of particular Treaty articles pays insufficient attention to internal limits expressed therein and thereby gives inadequate attention to important Member State values/concerns'.⁹⁷ But as O'Leary astutely observed, '[t]he difficulty with Article 24(2) of the Directive is that the legislature acted after the Articles 18 and 21 TFEU horse had already bolted'.⁹⁸ So what happens to the *substance* of rights developed judicially at Treaty level – endowing primary rights with a legal significance *apart* from secondary law – when the judiciary later retracts these rights through prioritising different or altered objectives? Where does primary-ness then go?

Phrased differently from the conditions/limits phrasing of Article 21 TFEU, the prohibition on discrimination in Article 18 TFEU applies '[w]ithin the scope of application of the Treaties and without prejudice to *any special provisions contained therein*' – denoting the validity of e.g. Article 45(3) and 45(4) TFEU, which articulate permissible limits on the equal treatment of workers. Article 18 TFEU is silent on its potential limitation by secondary law. One possibility is that such capacity could be imputed *back* to Article 18 indirectly by way of Article 21 TFEU as a 'special provision' in the Treaty.⁹⁹ But even if that is correct, it has long been recognised that 'the prohibition of discrimination laid down in [Article 18 TFEU] is merely a specific enunciation of the general principle of equality which is one of the fundamental principles of [Union] law'.¹⁰⁰ The Court has also determined that '[f]undamental rights include the general principle of equality and non-discrimination [precluding] comparable situations from being treated in a different manner unless the difference in treatment is objectively justified'.¹⁰¹ Proportionality analysis is then applied precisely to ensure that differences in treatment are objectively justified. The

⁹⁶ Opinion of AG Kokott in Case C-75/11 *Commission v Austria*, EU:C:2012:536, para. 80 (emphasis added).

⁹⁷ Craig, 'The ECJ and ultra vires action: a conceptual analysis' (2011) 48:2 CMLRev 395 at 412.

⁹⁸ O'Leary, 'The curious case of frontier workers and study finance: *Giersch*' in (2014) 51:3 CMLRev 601 at 617.

⁹⁹ See Hailbronner, n67 above, 1248-49.

¹⁰⁰ Joined Cases 117/76 and 16/77 *Ruckdeschel*, EU:C:1977:160, para. 7.

¹⁰¹ Case C-442/00 *Rodríguez Caballero*, EU:C:2002:752, para. 32. Equal treatment as a general principle has been used in other strands of citizenship case law; see e.g. Case C-391/09 *Runevič-Vardyn and Wardyn* EU:C:2011:291, para. 43.

acknowledged burden of undertaking an analysis of individual cases is then a consequence of having deployed the status of citizenship in the first place.¹⁰² Moreover, the Court has emphasised that ‘*all* [Union] acts must be interpreted in accordance with primary law *as a whole*, including the principle of equal treatment’.¹⁰³

The judgment in *Dano* never pauses to engage with – or distinguish – these established premises of EU law. It never reconciles the subsuming of equal treatment into secondary law with the conventional paradigm on conditions and limits. It simply ignores it. Article 24(1) of the Directive, unlike Article 18 TFEU, does refer to conditions and limits established *in secondary law* as well as in the Treaty – the amendment added by the Council and the power of which was arguably overlooked. It is now clear that those words transform the apparent expression of a *right* into a wider *derogation* than Article 24(2) was ever intended or able to achieve. By assenting without comment to this legislative version of primary law, the Court rescinds its duty of scrutiny over secondary law in two ways: it declines to review the legitimacy of legislative limits vis-à-vis the Treaty and wider principles at both a *general* level and in the *individual* case.¹⁰⁴ But while Article 21 TFEU shelters the conditions and limits in Directive 2004/38 on one view, it also brings that measure *up to* constitutional level, which should in turn attract constitutional-level review.¹⁰⁵

Instead, by condensing the entire legal framework downwards to secondary law, it was not difficult for the Court to conclude that ‘a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38’.¹⁰⁶ Since Ms Dano was not economically active and did not (according to the

¹⁰² For a different view, see Hailbronner, n67 above, 1251-54.

¹⁰³ Joined Cases C-402/07 and C-432/07 *Sturgeon*, EU:C:2009:716, para. 48 (emphasis added).

¹⁰⁴ See similarly, Dougan, ‘The constitutional dimension to the case law on Union citizenship’ (2006) 31:5 ELRev 613 at 624, ‘appreciating both the principle of proportionality as a ground of judicial review over regulatory choices made by the Community legislature, and the impact of the introduction of Union citizenship for the constitutional environment in which that proportionality assessment is conducted’ (see also, 632-33).

¹⁰⁵ See in a different context, Davies, ‘Legislative control of the European Court of Justice’ (2014) 51:6 CMLRev 1579 at 1586: ‘an act of legislation is, at least sometimes, an act of constitutional interpretation, since it embodies a claim about what the constitution allows’.

¹⁰⁶ *Dano*, para. 69. On this point, Thym argues that the Grand Chamber ‘effectively reversed the objective of Directive 2004/38’ (n4 above, 25), characterizing the finding as a ‘noteworthy

referring court) have sufficient resources for herself and her son¹⁰⁷ – a point returned to below – she did not satisfy the conditions of Article 7(1) and was not therefore entitled to social assistance on the same basis as nationals of the host State.¹⁰⁸ The Court considered that to find otherwise would ‘run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State’.¹⁰⁹

That statement bridges to the second issue: *preventing abuse of free movement rights*. The Court ruled that since ‘Article 7(1)(b)...seeks to prevent economically inactive Union citizens from using the host Member State’s welfare system to fund their means of subsistence...[a] Member State must therefore have the possibility...of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement *solely in order to obtain another Member State’s social assistance* although they do not have sufficient resources to claim a right of residence’.¹¹⁰ Generally, the motivation of the mobile citizen is not relevant, even where situations are constructed purely to acquire EU rights.¹¹¹ However, intention is a factor when it concerns the (required) subjective element of establishing an abuse of rights i.e. ‘the intention to obtain an advantage from the EU rules by *artificially* creating the conditions laid down for obtaining it’.¹¹²

In *Dano*, the Court did not expressly identify any ‘artificiality’ dimension in the applicant’s circumstances. There was also no clear statement that she came to Germany *solely* to obtain social assistance there: to impute this from the fact that ‘she is not seeking employment and...did not enter Germany in order to work’ (para. 66) is at least questionable in light of the gap in time between her presence in Germany

shift of emphasis, which accentuates Member State interests, while side-lining countervailing constitutional arguments that could have justified a different outcome’.

¹⁰⁷ *Dano*, para. 81.

¹⁰⁸ *Dano*, paras 70-73.

¹⁰⁹ *Dano*, para. 74.

¹¹⁰ *Dano*, paras 76 and 78 (emphasis added).

¹¹¹ E.g. on Article 45 TFEU, *Akrich*, n48 above, paras 55-57 and Case C-46/12 N, EU:C:2013:97, para. 47; on Directive 2004/38 generally, *Metock*, n49 above, para. 75 and Case C-202/13 *McCarthy II*, EU:C:2014:2450, paras 45-56.

¹¹² *McCarthy II*, para. 54 (emphasis added).

(noting that her son was born there in 2009) and her first application for basic provision (which was rejected in 2011). Moreover, a Union citizen can reside in a host State for up to three months under no conditions at all. When does the *Dano* clock actually start ticking, meaning that citizens can be asked about their motivation(s) for exercising free movement rights? In any event, the approval in *Dano* of national legislation excluding entitlement to social assistance for *categories* of citizens – contra *Brey* – as a means to address *possible* abuses of rights removes the option of assessing or even asking the relevant questions in individual cases in the first place.

Confusingly, just one month later, we see a fundamentally different (yet more standard) approach to abuse of rights in *McCarthy II* – another Grand Chamber case though sharing a minority of (six) judges with the composition for *Dano*. The context of *McCarthy II* was different: whether States can require third-country national family members holding a residence card from another State under Article 10 of the Directive also to have an entry permit pursuant to their national law. More particularly, it was queried whether that requirement might be permitted by Article 35 of Directive 2004/38, which provides that States ‘may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience’. While Article 35 was not invoked explicitly in *Dano*, the Court considered there that ‘Article 7(1)(b)...seeks to prevent economically inactive Union citizens from using the host Member State’s welfare system to fund their means of subsistence’.¹¹³ Authority for States to adopt *legislation* precluding access to benefits in such cases was then pulled from that rationale. However, in *McCarthy II*, the need to assess the individual position of each person affected was paramount once again. In particular, the Court held that States are ‘required to recognise such a residence card for the purposes of entry into their territory without a visa, unless doubt is cast on the authenticity of that card and the correctness of the data appearing on it by *concrete evidence that*

¹¹³ *Dano*, para. 76.

*relates to the individual case in question and justifies the conclusion that there is an abuse of rights or fraud’.*¹¹⁴ It continued:

[T]he fact that a Member State is faced...with a high number of cases of abuse of rights or fraud committed by third-country nationals resorting to sham marriages or using falsified residence cards *cannot justify* the adoption of a measure...*founded on considerations of general prevention, to the exclusion of any specific assessment of the conduct of the person concerned himself*...Such measures, being automatic in nature, would allow Member States to leave the provisions of Directive 2004/38 unapplied and *would disregard the very substance of the primary and individual right* of Union citizens to move and reside freely ...¹¹⁵

It is notable to see primary rights being used to interpret the provisions and scheme of the Directive (again) here – not the other way around.

Linking to the third issue, through the confirmation in *Dano* that States may enact legislation to frustrate even the prospect of benefit tourism, the *formerly central place of individual assessments is radically downgraded*. A framework that requires case-by-case assessments is far from perfect, especially from the perspectives of legal certainty and workability in practice.¹¹⁶ However, it does mediate the ambiguities built into the Directive. It places an obligation on national authorities at least to *hear* each claim. It encourages this not in the *permission* culture of standard immigration rules, but in the *rights*-based singularity of a transnational order rooted in citizenship.¹¹⁷ In contrast, generalised exclusion transgresses the framework of the formative case law, and sits oddly with the focus on the individual that shines thorough more pervasively across the scheme of the Directive.¹¹⁸

¹¹⁴ *McCarthy II*, para. 53 (emphasis added); the Court also restated case law that requires both objective and subjective factors to establish abuse of rights (para. 54).

¹¹⁵ *McCarthy II*, paras 55-57.

¹¹⁶ See also, O’Leary, n98 above at 621-22.

¹¹⁷ See generally, Shaw and Miller, ‘When legal worlds collide: an exploration of what happens when EU free movement law meets UK immigration law’ (2013) 38:1 ELRev 137.

¹¹⁸ As well as Articles 27(2) and 28(1) (protection against expulsion), see also e.g. Articles 3(2) (beneficiaries), 5(4) (travel documents for third-country national family members), 8(4) (level of sufficient resources), and 14(4)(b) (retention of residence rights for jobseekers. On Article 8(4) in particular, see Verschueren, n89 above at 383.

Strikingly, the several paragraphs in *Brey* prescribing the factors to be taken into account by national authorities were reduced to one line in *Dano*,¹¹⁹ with no reference to *Brey* here and no mention – *anywhere* – of the requirements of or even *the word* proportionality. But what is the implication of the stated fact that Ms Dano's sister provides materially for her and for her son? Was Ms Dano's inability to seek work connected to the need to care for her young son as a single parent? Was her situation temporary i.e. would recourse to benefits be of limited duration as her son became older? Whether the referring court considered these factors when it concluded on the *insufficiency* of her resources was never probed. Instead, the Court's generalised summation – 'that Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b)...must be interpreted *as not precluding legislation*'¹²⁰ – completes a rights-curbing retreat that nullifies the autonomous worth of the primary rights-driven preference for individual assessments. It may be that *Brey* still applies where States have not enacted generalised exclusion as part of their national rules. Ironically, *Dano* saves that more severe regulatory step when taken. The judgment thus achieves the harder outcome of the abandoned draft of Article 24(2), so it cannot be claimed straightforwardly that the result in *Dano* represents a more authentic version of citizenship rights intended by the legislature.

Finally, the Court also *ruled out the application of the Charter* in the circumstances of the case. The referring court asked 'whether Articles 1 [human dignity], 20 [equality before the law] and 51 of the Charter must be interpreted as requiring the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home State'.¹²¹ The Court responded:

[Regulation 883/2004] is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions. Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or

¹¹⁹ *Dano*, para. 80.

¹²⁰ *Dano*, para. 84 (emphasis added).

¹²¹ *Dano*, para. 85.

other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence...to define the extent of the social cover provided by that type of benefit. Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, *they are not implementing EU law*.¹²²

The Court recalled that ‘the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for [it] or modify powers and tasks as defined in the Treaties’.¹²³ Moreover, ‘Article 51(1)...states that the provisions of the Charter are addressed ‘to the Member States only when they are implementing Union law’.¹²⁴

However, the Court fixated in *Dano* on the input of EU secondary legislation and did not cite its broader characterisation of ‘implementing Union law’ in *Åkerberg Fransson* i.e. when national legislation ‘falls within the scope of European Union law’.¹²⁵ How can national legislation that excludes certain Union citizens from eligibility for social assistance *not* fall within the scope of Union law? In *Stewart*, the Court ruled that ‘[s]ituations falling within the material scope of EU law include *those involving the exercise of the fundamental freedoms guaranteed by the Treaties*, in particular those involving the freedom to move and reside...as conferred by Article 21 TFEU’.¹²⁶ The Court had said explicitly in *Dano* that the national rules at issue delivered an objective of Article 7(1)(b) of the Directive. Its thin approach to the scope of the Charter thus shaved away another layer of scrutiny over conditions and limits.¹²⁷

Overall, it now seems insufficient to exercise free movement as a *fact*. It is no longer clear if citizens authorised to reside on the basis of national law (like Mrs Martínez Sala) would still have benefit from equal treatment rights outside the

¹²² *Dano*, paras 89-91 (emphasis added).

¹²³ *Dano*, para. 88, citing e.g. Case C-617/10 *Åkerberg Fransson*, EU:C:2013:105, paras 17 and 23.

¹²⁴ *Dano*, para. 87.

¹²⁵ *Åkerberg Fransson*, para. 19 (emphasis added). See also, *Iida*, n62 above, paras 78-79; Case C-571/10 *Kamberaj*, EU:C:2012:233, paras 79-80; and Case C-198/13 *Julian Hernández*, EU:C:2014:2055, paras 32-37.

¹²⁶ Case C-503/09 *Stewart*, EU:C:2011:500, para. 81 (emphasis added); citing *Grzelczyk*, para. 33, *D’Hoop*, para 29, and Case C-544/07 *Rüffler*, EU:C:2009:258, para. 63. On both distinctions and similarities between ‘incoming’ and ‘outgoing’ situations of social assistance, see Jesse, case comment on *Ziolkowski and Szeja* (2012) 49:6 CMLRev 2003 at 2015-16.

¹²⁷ Cf. e.g. Case C-300/11 *ZZ*, EU:C:2013:363, paras 49-52.

structure of the Directive. After all, she did not, drawing from Article 24(1), reside in Germany *on its basis*. This issue is returned to in Section 4. However, the residence right extended to Mr Baumbast, by mitigation through proportionality of the legislative requirement of sickness insurance for all risks, would no longer seem feasible. Moreover, as Thym has argued, it is not that the right to reside in the host State is being *limited* in *Dano*. Instead, the judgment suggests that no right to reside *exists* to be limited in the first place if Article 7(1) conditions are not met.¹²⁸ This suggests that the *Baumbast* boundary between regulating the *exercise* and *existence* of free movement rights has therefore now been crossed.

Thym also notes that case law on access to social assistance for economically inactive citizens concerns ‘a group...whose overall numbers may be small, but which are, nonetheless, the centre of legal and political debates’.¹²⁹ Diluting equal treatment rights for these citizens becomes a barometer for the autonomous content of citizenship; for what depth of substance the status actually contributes beyond the practice of economic activity. Interestingly, notwithstanding the national court’s finding that sufficient resources were lacking, there is no reminder to Germany to consider the deportation of Ms Dano and her son.¹³⁰ This omission might be seen as a positive step on one view. But it draws attention to a class of Union citizens who are passively *tolerated* yet not actively *supported* where they reside. This idea is developed further in Section 4.2, considering the grey legal space that these citizens occupy and the deepening polarity between persons sharing a *status* under but not the *protection* of EU law. The Court is undoubtedly between a rock and a (very) hard place as the original defender of a version of citizenship too detached from a wider mood of integration estrangement. But the constitutional price paid through *Dano* was too high, however sympathetic the metric of evaluation might be. The Court neither reconciled rooted case law on conditions and limits with its revised logic, nor openly

¹²⁸ Thym, ‘When Union citizens turn into illegal migrants: the *Dano* case’ (2015) 40:2 ELRev 249 at 257-58. If the host State proceeds to expulsion in these circumstances, the obligations owed to citizens are outlined in Articles 14 and 15 of the Directive. In particular, Article 15(1) links to the procedural safeguards guaranteed by Articles 30 and 31; see Peers, ‘In light of the *Dano* judgment, when can unemployed EU citizens be expelled?’, at <http://eulawanalysis.blogspot.co.uk/2014/11/in-light-of-dano-judgment-when-can.html>.

¹²⁹ Thym, n4 above, 21.

¹³⁰ Cf. Grzelczyk, n2 above, para. 42; *Trojani*, n25 above, para. 45.

reversed it. The result is a distorted and unconvincing jurisprudence; but more fundamentally, a status splintered further into tiers and, ultimately, diminished.

3.2. *Inflation: acquiring permanent residence*

We saw in Section 2.1.2 that the European Parliament added a legal residence condition to the requirement of continuous residence for the purposes of Article 16(1) of Directive 2004/38. Initial reflections on legal residence outlined two alternatives: one mapped case law emphasising the overarching weight of primary rights;¹³¹ but the other prioritised the internal scheme of the Directive. Recital 17 notes the hope that permanent residence will ‘strengthen the feeling of Union citizenship’ and that it is ‘a key element in promoting social cohesion’. It then states that the right should be ‘laid down for all Union citizens and their family members who have resided in the host Member State *in compliance with the conditions laid down in this Directive* during a continuous period of five years without becoming subject to an expulsion measure’. In *Lassal*, AG Trstenjak suggested that ‘there is something to be said for interpreting...recital 17 to mean that a right of permanent residence...can arise only where the continuous period of five years’ residence was completed in accordance with the provisions of [Union] law’.¹³² She developed the point in *Dias*, judgment in which was delivered four months after *Ruiz Zambrano*.

The key question in *Dias* was whether residence completed on the basis of a valid permit issued by national authorities could count as *legal* residence for the purposes of Article 16. AG Trstenjak acknowledged that the wording of the provision is ‘sufficiently open’ to accommodate such periods;¹³³ but argued that ‘[w]hat is decisive is thus the spirit and purpose behind the European Union legislature’s adoption of Article 16’, noting that recital 17 was introduced by the Council.¹³⁴ The Court reached similar conclusions, relying on the standard premise

¹³¹ E.g. AG Kokott in *McCarthy*, EU:C:2010:718, paras 51-53 (emphasis added); citing, inter alia, *Lassal*, *Martinez Sala*, and *Trojani*. See also, her Opinion in Case C-480/08 *Teixeira*, EU:C:2009:642, paras 117-120.

¹³² Opinion of AG Trstenjak in *Lassal*, EU:C:2010:266, para. 88.

¹³³ Opinion of AG Trstenjak in Case C-325/09 *Dias*, EU:C:2011:86, para. 73 (emphasis added).

¹³⁴ *Ibid*, para. 75; see also, para. 77.

that permits are declaratory rather than constitutive of residence rights in an atypically rights-curbing way.¹³⁵ But the beginnings of a dynamic of inflation emerge when the Court compares periods of residence in a host State on the basis of national law with periods of *absence*, which are expressly covered by Article 16(4):

Even though [Article 16(4)] *refers only to absences* from the host Member State, *the integration link between the person concerned and that Member State is also called into question* in the case of a citizen who, while having resided legally for a continuous period of five years, then decides to remain in that Member State without having a right of residence. [T]he integration objective which lies behind the acquisition of the right of permanent residence...is based *not only on territorial and time factors but also on qualitative elements*, relating to the *level of integration* in the host Member State. *As the situations are comparable*, it follows that the rule *laid down* in Article 16(4)...*must also be applied by analogy* to periods in the host Member State completed on the basis solely of a residence permit validly issued under Directive 68/360, without the conditions governing entitlement to a right of residence of any kind having been satisfied ...¹³⁶

This reasoning transposes the ambition of integration to a discourse of obligation and responsibility, reflecting the implied duties discussed in Section 2.2. The judgment in *Ziolkowski and Szeja* (delivered five months later, at the end of 2011) amplifies that impression. This case addressed another dimension of legal residence: could periods of residence in a host State during which a Union citizen did not meet the conditions of Article 7(1) of the Directive be counted?

In *Ziolkowski and Szeja*, residence permits had been granted on humanitarian grounds to Polish nationals residing in Germany. Neither of the applicants had sufficient resources – a fact that affected the extension of their permits and in light of which the question of whether they resided *legally* was raised. The Court framed its judgment by first referring to the *McCarthy* version of the purpose of the Directive i.e. to set the conditions governing the exercise of free movement and residence rights.¹³⁷ It continued its cross-fertilisation across different provisions of the Directive from *Dias*, noting the *express* requirement in Articles 12(2) and 13(2) that the family

¹³⁵ *Dias*, EU:C:2011:498, paras 48-55; cf. Case 48/75 *Royer*, EU:C:1976:57, para. 33 and Case C-459/99 *MRAX*, EU:C:2002:461, para. 74.

¹³⁶ *Dias*, paras 63-65 (emphasis added).

¹³⁷ *Ziolkowski and Szeja*, n5 above, para. 36.

members of a Union citizen are required to meet the conditions of Article 7 to acquire permanent residence in the event of the citizen's death or departure or situations of divorce, annulment of marriage, or termination of registered partnership. On that basis, '[i]t follows that the concept of legal residence implied by the terms "have resided legally" in Article 16(1)...should be construed as meaning a period of residence which complies with the conditions laid down in the directive, in particular those set out in Article 7(1)'.¹³⁸ However, noting that both the Treaty and formative case law require that limits and conditions be *laid down* as a general requirement, why does it 'follow' that conditions laid down in certain provisions of the Directive also apply to other provisions from which they are actually absent?¹³⁹

Tying permanent residence to compliance with Article 7 of the Directive also has consequences for residence authorised by other strands of EU law. In particular, in situations involving the completion of education for the children of migrant workers, residence rights in a host State – for the children and their primary carers if relevant – are conferred by Regulation 492/2011 i.e. not by Directive 2004/38 but still by *Union* law. These individuals are exempt from the requirement to have sufficient resources.¹⁴⁰ However, in *Alarape and Tijani*, the Court ruled that while there is no

¹³⁸ *Ziolkowski and Sjeja*, para. 46 (emphasis added). The Court rejected an argument based on Article 37 of the Directive (para. 55), which had been accepted by AG Bot (EU:C:2011:575, para. 54). AG Bot had also argued that neither the legal source of residence rights nor the 'material circumstances' of an applicant affected the *degree* of integration experienced in the host State (para. 55 of the Opinion). However, the Court did accept that periods of residence in a host State that complied with Article 7 but were completed before the State of the citizen's nationality acceded to the Union could be counted (paras 56-63; confirmed in Joined Cases C-147/11 and C-148/11 *Czop and Punakova*, EU:C:2012:538).

¹³⁹ The reach of conditions by analogy has also been extended *beyond* the Directive, notably in the context of derived residence rights for third country national family members claimed against a Union citizen's home State following the exercise of free movement; see *O*, n68 above, paras 50 and 54, building on e.g. *Singh*, n12 above. In *McCarthy II*, AG Spunzar noted that he agreed with the outcome in *O*, but was 'sceptical about the reasoning...[T]he Court interpreted the Treaty in the light of secondary legislation, in particular Directive 2004/38. In that respect, let me at least express some doubt about such an interpretation, in the light of the principle of the hierarchy of primary law and secondary legislation. To my mind, it is secondary legislation that ought to be interpreted in the light of the Treaties, and not vice versa. Would there not otherwise be reason to fear that an act or a practice of the institutions or the Member State would lead to a revision of the Treaties outside the procedures prescribed for that purpose?' (EU:C:2014:345, para. 82 of the Opinion).

¹⁴⁰ Case C-310/08 *Ibrahim*, EU:C:2010:80, paras 51-58; *Teixeira*, n131 above, 62-70.

obligation to meet the Article 7 conditions in such cases, periods of residence completed without doing so could not generate permanent residence rights.¹⁴¹

The conditional framework of integration applied in the permanent residence case law thus confirms the ascension of implied duties; but in a primarily instrumental way, as signalled by AG Bot:

The ratio of the judgment in *Ziolkowski and Szeja* seems to me to be...the need to preserve the balance, desired by the Union legislature, between, on the one hand, requirements of freedom of movement and integration and, on the other, the financial interests of the Member States...In fact, since the 'quality' of integration is measured *exclusively* in the light of the condition of financial autonomy...it would be more realistic to infer that the conditions governing the acquisition of the right of permanent residence are *ultimately independent* of the level of integration of the claimant in the host Member State.¹⁴²

He also noted that since '[t]he link with the exercise of an economic activity, *which is considered to allow a sufficient level of integration to be presumed*, may, consequently, prove very tenuous, in particular where the Union citizen through whom the child holds his rights worked several years previously and for a very short period', it 'seems logical that children pursuing their studies should *themselves* be required to satisfy the requirements of Directive 2004/38'.¹⁴³ But the financial situation of the family will rarely, if ever, fall within the control of minor Union citizens. Even accepting that conditions should ask for more than mere *presence* in a host State for more than five years, it is odd that education there does not create the kind of qualitative integration that the case law aims to prescribe.¹⁴⁴ The result of not valuing this *kind* of integration is that children who may have been educated in the same State for most of their lives will have to start the residence-clock from scratch as adults to access the enhanced citizenship rights of permanent residence – something acknowledged by AG Bot but accepted as justifiable in the interests of the legal

¹⁴¹ Case C-529/11 *Alarape and Tijani*, EU:C:2013:290, paras 34-37. However, the Court was generous elsewhere in the judgment; in particular, it required an individual-centered assessment – rather than a blunt age of majority condition – when considering the duration of derived residence rights for primary carers.

¹⁴² Opinion of AG Bot in *Alarape and Tijani*, EU:C:2013:9, para. 80 (emphasis added).

¹⁴³ *Ibid*, para. 81 (emphasis added).

¹⁴⁴ See Jesse, n126 above, 2013; and Azoulai, n66 above, 9.

certainty.¹⁴⁵ It was stated in Section 3.1 that concerns about clarity and practical workability are absolutely valid. But they call for clearer and better *legislation*. By amplifying conditions and limits through case law instead, financial self-sufficiency ingests the substance of integration rather than constituting *one* element of a more rounded framework for assessing it; and that theme has clear parallels with the ingestion of equal treatment by Article 24 of the Directive seen above.

Paradoxically, rights-curbing outcomes are evident in another sector of permanent residence case law precisely through taking a broader look at each integration story i.e. beyond compliance with Article 7(1) in isolation. In *Onuekwere*, the Court ruled that periods of time spent in prison in a host State do not constitute legal residence; neither does that event pause the residence-clock so that rights might be acquired by aggregating periods in a host State before and after imprisonment.¹⁴⁶ The first premise of the reasoning was short-lived. Mr Onuekwere is a Nigerian national, married to an Irish national residing in the UK. The Court applied a literal reading of the fact that Article 16(2) extends permanent residence rights to family members who ‘have legally resided *with the Union citizen* in the host Member State for a continuous period of five years’.¹⁴⁷ When Mr Onuekwere was in prison, he obviously did not live ‘with’ his wife. But the severe implications of reading that condition so literally – spouses live separately for all kinds of reasons, including work or serious illness – were retracted in *Ogieriakhi* six months later (though with no reference to *Onuekwere* there at all). What was stated, ironically enough, was that a literal reading of Article 16(2) would not be ‘consistent with the need *not* to construe Directive 2004/38 narrowly’.¹⁴⁸

The second argument in *Onuekwere* links the social cohesion and ‘feeling of citizenship’ aims of recital 17 with the qualitative elements of integration highlighted in *Dias*. The Court reasoned that ‘the undermining of the link of integration between the person concerned and the host Member State justifies the loss of the right of

¹⁴⁵ Opinion of AG Bot in *Alarape and Tijani*, paras 93-94.

¹⁴⁶ Case C-378/12 *Onuekwere*, EU:C:2014:13. See similarly, on eligibility for enhanced protection under Article 28(3)(a) of the Directive, Case C-400/12 *G*, EU:C:2014:9.

¹⁴⁷ *Onuekwere*, para. 23.

¹⁴⁸ Case C-244/13 *Ogieriakhi*, EU:C:2014:2068, para. 40 (emphasis added).

permanent residence *even outside the circumstances mentioned in Article 16(4) of [the] Directive*¹⁴⁹ – again defying the Treaty requirement that conditions and limits must be laid down. In its view, ‘[t]he imposition of a prison sentence by the national court is such as to show the non-compliance by the person concerned with the values expressed by the society of the host Member State in its criminal law, with the result that the taking into consideration of periods of imprisonment for the purposes of the acquisition [of permanent residence] would clearly be contrary to the aim pursued by that directive in establishing that right’.¹⁵⁰

Azoulai has argued that ‘by stating that [the] objective [of promoting social cohesion] is perfectly consistent with the fact that the EU legislature made the acquisition of the right of permanent residence “*subject to integration of the citizen of the Union in the host MS*”, the Court changes the meaning of their concept of social cohesion. In this sense social cohesion is not about extending the possibility of creating bonds and promoting new forms of solidarity in Europe. It is mainly about respecting the particular value system of the host Member State’.¹⁵¹ The judgments on permanent residence are not then about a duty to integrate *per se*. They conceive a duty to integrate *properly*. That is done, first, by inflating the condition of legal residence in Article 16(1) and, second, by introducing a profile of ‘good’ and ‘bad’ Union citizens.¹⁵² Similar themes emerge in the discussion on protection against expulsion below.

3.3. Disruption: protection against expulsion

In Section 2.1.2, we saw that the importance placed by the legislature on *duration* of residence in a host State also found expression in the incremental framework for

¹⁴⁹ *Onuekwere*, para. 25 (emphasis added).

¹⁵⁰ *Onuekwere*, para. 26; rejecting aggregation of residence periods for the same reason, see para. 31.

¹⁵¹ Azoulai, n66 above, 16 (emphasis in original).

¹⁵² *Ibid*, 11; Nic Shuibhne and Shaw, ‘General Report – Union citizenship: development, impact and challenges’ in Neergaard, Jacquesen, and Holst-Christensen (eds.), *The XXVI FIDE Congress in Copenhagen 2014: Congress Publications Vol. 2* (DJOEF Publishing, 2014), 137 and 223-224; Coutts ‘Union citizenship as probationary citizenship: *Onuekwere*’ (2015) 52:2 CMLRev 531.

protection against expulsion in Articles 27 and 28 of the Directive. These provisions set three levels of protection: (1) Article 27(1): public policy, public security or public health for those who do not have permanent residence; (2) Article 28(2): *serious* grounds of public policy or public security after the acquisition of permanent residence; and (3) Article 28(3): *imperative* grounds of public security only for periods of residence exceeding ten years or for minors. However, notwithstanding the distinctions embedded in these levels, case law on expulsion displays the same recent shift towards limiting rights – but here, in *disruption* of the will of the legislature. In contrast to the case law on social assistance, where Article 24(1) of the Directive narrowed primary law, expulsion case law narrows the Directive.

The scope of Article 28 was first addressed in *Tsakouridis*. The Court framed its judgment by referring to the primary and individual nature of the right to move and reside, noting that the Directive ‘aims in particular to strengthen that right’.¹⁵³ The Court also recognised the *deliberate* deepening of protection built into Article 28:

[B]y subjecting all expulsion measures in the cases referred to in Article 28(3)...to the existence of ‘imperative grounds’ of public security, a concept which is *considerably stricter* than that of ‘serious grounds’ within the meaning of Article 28(2), the European Union legislature clearly intended to limit measures based on Article 28(3) to ‘exceptional circumstances’, as set out in recital 24 in the preamble to that directive. The concept of ‘imperative grounds of public security’ presupposes not only the existence of a threat to public security, but also that such a threat is of a particularly high degree of seriousness....¹⁵⁴

It then held that ‘objectives such as the fight against crime in connection with dealing in narcotics as part of an organised group are [not] necessarily excluded from’¹⁵⁵ the concept of public security – a finding criticised for ‘blur[ring] the distinction’ between Articles 28(2) and (3).¹⁵⁶ However, the obligation on national authorities to consider all relevant factors in each individual case was strongly affirmed.¹⁵⁷

It was seen in Section 3.2 that application of qualitative integration analysis results in the loss of permanent residence eligibility for citizens imprisoned in host

¹⁵³ Case C-145/09 *Tsakouridis*, EU:C:2010:708, para. 23.

¹⁵⁴ *Tsakouridis*, paras 40-41 (emphasis added).

¹⁵⁵ *Tsakouridis*, para. 45.

¹⁵⁶ Kostakopoulou, n66 above, 458-459

¹⁵⁷ *Tsakouridis*, paras 30-33 and 48-53.

States. In *G*, the same ‘vital consideration’ was held to condition enhanced protection against expulsion.¹⁵⁸ Again framed by the consequences of failing to accomplish *genuine* integration, it was held that ‘unlike the requisite period for acquiring a right of permanent residence, which begins when the person concerned *commences* lawful residence in the host Member State, the 10-year period of residence necessary for the grant of the enhanced protection provided for in Article 28(3)(a)...must be calculated by *counting back from* the date of the decision ordering that person’s expulsion’.¹⁵⁹ A condition of *continuous* residence was also read into the provision.¹⁶⁰ These findings already contract the intended distinction between levels of protection in the Directive. But in the 2012 judgment in *I*, the distinction breaks down completely.¹⁶¹

In May 2006, Mr I, who was born in Italy but had lived in Germany since 1987, was sentenced to imprisonment for sexual offences committed against his former partner’s daughter. The referring court asked whether Mr I’s actions constituted imperative grounds of public security, which, noting the duration of his residence in Germany, would be necessary for expulsion to be considered. The Court first recalled *Tsakouridis* on the intended distinction between serious and imperative grounds of public security, reiterating that the latter concept is ‘considerably stricter’. In *Tsakouridis*, the Court invoked classic case law on public security, recalling that its scope covers both the internal and external security of a State and that ‘a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations, or a risk to military interests, may affect public security’.¹⁶² While fully recognising the seriousness of the acts at issue in *I*, the applicant’s conduct could not meet that definition.¹⁶³ But the Court confirmed only

¹⁵⁸ *G*, n147 above, paras 32-33.

¹⁵⁹ *Ibid*, para. 24 (emphasis added).

¹⁶⁰ *Ibid*, paras 25-27.

¹⁶¹ In a blistering critique, Kochenov and Pirker argue that the judgment is ‘a clear ultra-vires action...a contra legem interpretation of Directive 2004/38 coupled with a systemic departure from the fundamental principles of European integration’ (‘Deporting the citizens within the European Union: a counter-intuitive trend in Case C-348/09 PI v Oberbürgermeisterin der Stadt Remscheid’ 19 *Columbia Journal of European Law* (2013) 369 at 372).

¹⁶² *Tsakouridis*, para. 44.

¹⁶³ As AG Bot acknowledged; EU:C:2010:322, paras 44-46 of the Opinion.

the internal/external security point from *Tsakouridis* and did not repeat the concrete examples cited there. Instead, it referred to various instruments of EU law to underline the particularly serious nature of the sexual abuse and sexual exploitation of children,¹⁶⁴ and recast the essence of public security to fit the offences in the case:

[I]t is open to the Member States to regard criminal offences such as those referred to in...Article 83(1) TFEU as constituting a particularly serious threat to one of the fundamental interests of society, which *might pose a direct threat to the calm and physical security of the population and thus be covered by the concept of 'imperative grounds of public security'*, capable of justifying an expulsion measure under Article 28(3) of Directive 2004/38, as long as *the manner in which such offences were committed discloses particularly serious characteristics*, which is a matter for the referring court to determine on the basis of an individual examination of the specific case before it.¹⁶⁵

This definition – which refers not ‘to the institutions or components of the State...but rather...a heightened threat to underlying values of society’¹⁶⁶ – hands an extraordinary degree of expulsion power (back) to national authorities in the face of extensive evidence that not even the baseline protections of the Directive are properly applied already.¹⁶⁷ It contravenes both the wording and purpose of Article 28(3).¹⁶⁸ In particular, it writes public policy into that provision even though the legislature deliberately left it out.¹⁶⁹ It departs from the standard rights broadly/derogations narrowly paradigm that is especially vital in situations of expulsion. The revitalisation of punishment-plus-banishment is difficult to square with the objective of rehabilitation, rooted in human dignity and committed to by the States,¹⁷⁰ yet it feeds a misplaced expectation that States can always exclude ‘bad’ Union citizens – as if the intended *strengthening* of protection through the Directive

¹⁶⁴ Case C-348/09 *I*, EU:C:2012:300, paras 25-28.

¹⁶⁵ *I*, para. 28 (emphasis added).

¹⁶⁶ Azuolai and Coutts, ‘Restricting Union citizen’s residence rights on grounds of public security: where Union citizenship and the AFSJ meet: *P.I.*’ (2013) 50:2 CMLRev 553 at 554.

¹⁶⁷ E.g. Nic Shuibhne and Shaw, n152 above, commentary on Q6, with detailed examples in several of the volume’s national reports.

¹⁶⁸ Cf. Opinion of AG Bot, paras 44-46.

¹⁶⁹ See generally, Anagnostaras, ‘Enhanced protection of EU nationals against expulsion and the concept of internal public security: Comment on the *PI* case’ (2012) 37:5 ELRev 627.

¹⁷⁰ Opinion of AG Bot in *Tsakouridis*, paras 48-50. In *Onuekwere*, the same Advocate General pushed his analysis more towards the balancing factor of retribution (paras 55-57 of that Opinion) but in the context of permanent residence rights rather than expulsion.

had never happened.¹⁷¹ The decision thus underscores the argument that recent case law exceeds respect for the will of the legislature.

However, Azoulai and Coutts offer a 'more generous interpretation' of the judgment, suggesting that it 'add[s] to the substance of Union citizenship by complementing the rights of the Directive with correlative obligations' and arguing:

... Union citizenship should not be seen as an individual prerogative, but as part of a broader process of interaction whereby the obligation of the Member State to recognise the migrant is mirrored by the obligation of the migrant to recognise the common space of values he or she is given to live in, in the form that is particularised in the host society...The transnational rights of Union citizenship carry with them correlative duties to comply with the common values of the Union's public order...That is not to say that these duties (to obey criminal law) are placed only on migrant citizens. They hold too for the nationals of the host Member State. However, the consequences of their breach are different and indeed more severe for Union citizens...[T]he right to reside on the territory of other Member States and their societies is necessarily more contingent, subject to recognition and open to forfeiture, than that enjoyed by nationals of that State.¹⁷²

Azoulai and Coutts raise vital questions here about the appropriate *balance* of rights and limits within Union citizenship. In particular, the sense that free movement law has promoted the worth of individual choice above pretty much all else is open to strong critique. Davies put it bluntly by characterising citizenship as 'narcissistic' if it is built on a tactic of 'glorifying the individual and humiliating the state', and could 'result in backlash'.¹⁷³ However, we need to be careful that responses to disaffection do not *empty* the status of citizenship either. To Kochenov's caution that '[a]ny system based on duties necessarily implies a strong predetermined set of

¹⁷¹ Kostakopoulou and Ferreira, 'Testing liberal norms: the public policy and public security derogations and the cracks in European Union citizenship', Warwick School of Law, Legal Studies Paper No 2013/18, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2271722, 13. They point to para. 3.1 of the Commission's Communication on better transposition and application of the Directive (Com(2009) 313 final), which states that: 'It is crucial that Member States...make a clear distinction between public policy and public security. The latter cannot be extended to measures that should be covered by the former'.

¹⁷² Azoulai and Coutts, n166 above, 568 and 570. See similarly, Azoulai, n66 above, 9.

¹⁷³ Davies 'The humiliation of the state as a constitutional tactic' in Amtenbrink and van den Berg, *The Constitutional Integrity of the European Union* (2010, Asser Press) 147 at 173-174.

prescriptions of good and bad and right and wrong',¹⁷⁴ we should add the risk highlighted by Spaventa: 'the idea that there are qualitative criteria that can be imposed on Union citizens leaves the door open to further qualifications'.¹⁷⁵ The development of duties outside legislation undoes much of the progress made towards taking seriously the 'equalising dimensions' of Union citizenship as a fundamental status.¹⁷⁶ In *Tsakouridis*, AG Bot articulated the consequences of founding an area of free movement:

[T]he creation of a common space for living and moving also requires account to be taken, in the overall interest of that communal space...of the phenomenon of delinquency, even if it means developing common means of preventing and combating it...That space cannot be constructed on the basis of returning any severely punished offender to the Member State of origin, solely on grounds of the penalty imposed.¹⁷⁷

States inevitably treat the nationals of other States differently since they 'cannot remove [their own nationals] from national territory or deny them access to that territory. However, that does not mean that the sanctions applied to a Member State's own nationals and to nationals of other Member States may be entirely different'.¹⁷⁸ By diluting the intended scope of imperative grounds of public security in *I*, the Court converted an exceptional protection *against* expulsion into a route *towards* it. The collapsing of the test into the more generic concept of public policy has profound implications for the residence-stability of citizens.¹⁷⁹ It exacerbates 'the stigmatisation of difference' even though 'the promotion of exclusion and the stigmatisation of difference are straightforwardly antithetical to the objectives which

¹⁷⁴ Kochenov, n57 above, 484.

¹⁷⁵ Spaventa, n66 above; see similarly, Kochenov and Pirker, n161 above, 384-385.

¹⁷⁶ Kostakopoulou, n66 above, 460; see also, 462: '[citizenship] risks being demoted from a fundamental status and a principle of immense constitutional importance to EU law to a thin overlay upon rooted and *persistent* national statuses' (emphasis added).

¹⁷⁷ Opinion of AG Bot in *Tsakouridis*, para. 46.

¹⁷⁸ Opinion of AG Geelhoed in *Akrich*, EU:C:2003:112 para. 93; see similarly, AG Poiares Maduro in *Huber*, n3 above, paras 6-7 and para. 15.

¹⁷⁹ Using the language of 'homelessness', see Kostakopoulou and Ferreira, n171 above, 3-4. Kochenov and Pirker (n161 above) draw an interesting contrast between the 'internal' deportation from one State to another that is permitted for Union citizens and the prohibition on 'external' deportation from the Union established in *Ruiz Zambrano*. See generally, Nic Shuibhne and Shaw, n152 above, 65 and the commentary on Q6.

the Union is set to achieve'.¹⁸⁰ In common with the judgment in *Dano* and those on permanent residence, the ruling suggests that 'unlawful presence brings about *no legally significant quality of social integration* under EU law'.¹⁸¹ It thereby fortifies the apparently unshakeable primacy of *nationality*.

Addressing Directive 2004/38, Davies is right that 'there has never been any serious policy argument about whether such conditions should exist, since there is a broad consensus that entirely removing them could have harmful effects on national institutions and finances, not to mention politics. Debate is about exactly what those conditions should be'.¹⁸² The case law on expulsion brings another dimension to that debate. It involves reconstitution of what the conditions *should* be irrespective and in disruption of what they actually still *are*. Recent case law on social assistance can be linked to the *application* of legislation, even if it does raise difficult constitutional questions. The *inflation* of conditions in case law on permanent residence can arguably be linked to the measure's broader scheme, even if this involves revised readings of its purpose and objectives. But the *disruption* of the Directive in case law on protection against expulsion crosses another line altogether.

4. Implications: the hardening schism of citizenship categories

The case law shift presented in Section 3 exhibits generalisation and hardening of the conditions, limits, and duties of Union citizenship. The changing legal shape that results requires us to question if the *existence* – and not just the *exercise* – of free movement rights has been undermined and whether the claim that Union citizenship is a fundamental status can be sustained. The consolidation and simplification objectives of Directive 2004/38 may have been achieved through the creation of rules that apply differently to different categories of citizen. But the increasingly harsh application – and extension – of that framework reveals a problematic diffusion of rights in reality. Union citizenship looks less like a status rooted in rights and more

¹⁸⁰ Kochenov, n57 above, 486.

¹⁸¹ Thym, n4 above, 39 (emphasis added).

¹⁸² Davies, n105 above, 1599.

like an increasingly qualified *privilege*¹⁸³ – with *mutable* channels of admission, especially where restrictions are not provided for or laid down.

In this section, it will first be shown that the conventional approach to conditions, limits and duties still applies for certain categories of citizen: essentially, for the economically active. The contrasting position of another category of citizen is then considered – the *tolerated* citizen who is not expelled from a host State but is not supported there either; who might be lawfully resident under national or Union law beyond the Directive but is excluded from permanent residence rights; or who may have resided in a host State for several years but is nevertheless excluded from enhanced protection against expulsion. Formative case law aimed to converge the status and protection of both categories of citizen; but more recently, their fates have been riven. While it might be argued that these developments increasingly reflect the wider political mood across the Union, or at least the governments of certain Member States, the legal problem is that stronger rights that were previously connected to and entrenched at the level of primary EU law have been reduced – without any changes to, or even sufficient discussion of, their Treaty source.

4.1. *Still fundamental*

The conditions in Article 7(1) of the Directive are the gateway to free movement: if they can be satisfied, a multiverse of rights and privileges unfolds for ‘good’ citizens. In *Dano*, the Court separated out the two statuses within that provision, distinguishing between ‘(i) persons who are working and (ii) those who are not. Under Article 7(1)(a)...the first group of Union citizens in the host Member State have the right of residence *without having to fulfil any other condition*. On the other hand, persons who are economically inactive are required by Article 7(1)(b)...to meet the condition that they have sufficient resources of their own’.¹⁸⁴ The idea that economically active citizens do not have to fulfil ‘any other condition’ is an

¹⁸³ See Coutts, n152 above, 543-545, on Union citizenship as ‘probationary citizenship’, noting that ‘virtually none of the interpretative choices made by the Court are rooted in the provisions of the Directive’ (544).

¹⁸⁴ *Dano*, n6 above, para. 75 (emphasis added).

entrenched norm of free movement law and of Article 45 TFEU in particular.¹⁸⁵ In striking contrast to the legitimacy of protecting public finances in citizenship law generally, the Court asserts that '[t]o accept budgetary concerns may justify a difference in treatment between migrant workers and national workers would imply that the application and the scope of a rule of EU law as *fundamental as non-discrimination on grounds of nationality* might vary in time and place according to the state of the public finances of Member States'.¹⁸⁶ O'Brien rightly concludes from this that 'the self-evident truth of the fundamental law of non-discrimination dissolves when dealing with non-workers'.¹⁸⁷

Similarly, linking back to Section 3.1.2, the question of intention – central for citizens who are not economically active in *Dano* – continues to be set aside for situations involving the free movement of workers.¹⁸⁸ For both groups, the assessment turns on whether access to social assistance or other social advantages was the *sole* objective of the mobile citizen. But the functional taking up of effective (per *Kempf*) part-time work provides absolution. The Court was clear on this point in *N*, ruling that enjoyment of free movement rights under Article 45 TFEU may not 'be made contingent on which objectives are being pursued by a national of a Member State *in applying to enter the territory* of a host Member State, *provided that he pursues or wishes to pursue* effective and genuine employment activities. Once that condition is satisfied, the *motives which may have* prompted a worker of a Member State to seek employment in another Member State *are of no account and must not be taken into*

¹⁸⁵ *Kempf*, n19 above, para. 14: 'a person in effective and genuine part-time employment cannot be excluded from [rules on the free movement of workers] merely because the remuneration he derives...is below the level of the minimum means of subsistence and he seeks to supplement it by other lawful means of subsistence. In that regard *it is irrelevant* whether those supplementary means of subsistence are derived from property or from the employment of a member of his family...or whether...they are obtained from *financial assistance drawn from the public funds of the Member State in which he resides*, provided that the effective and genuine nature of his work is established' (emphasis added).

¹⁸⁶ Case C-542/09 *Commission v Netherlands*, EU:C:2012:346, para. 58 (emphasis added). In her Opinion, AG Sharpston stated that '[a]ny limitation imposed for preserving financial integrity must be applied on equal terms to national workers and migrant workers' (EU:C:2012:79, para. 91).

¹⁸⁷ O'Brien, 'I trade, therefore I am: legal personhood in the European Union' (2013) 50:4 CMLRev 1643 at 1650.

¹⁸⁸ E.g. Case C-413/01 *Ninni-Orasche*, EU:C:2003:600, para. 31.

consideration'.¹⁸⁹ It is perhaps unsurprising but still poignant to find in *N* precisely the phrases that also once shaped the Court's case law on citizens who are *not* economically active.¹⁹⁰

In another parallel with formative case law on citizenship rights, when the wording of the Directive pushes *against* the priority accorded to economic activity, the Court goes outside the Directive and back to primary law. As well as benefits for jobseekers, noted in Section 3.1, another example concerns the retention of worker status. We saw in Section 3.2 that periods in prison could not be counted towards acquisition of permanent residence rights. However, in earlier case law, the Court ruled that 'in respect...of prisoners who were employed before their imprisonment, the fact that the person concerned was not available on the employment market during such imprisonment *does not mean, as a general rule, that he did not continue to be duly registered as belonging to the labour force of the host Member State* during that period, provided that he actually finds another job *within a reasonable time* after his release'.¹⁹¹ In *Saint Prix*, the Court drew an unlikely connection between imprisonment and pregnancy to extend the same protection of residence status for the citizen concerned. Article 7(3) of Directive 2004/38 establishes circumstances in which a Union citizen who is no longer employed or self-employed retains that status in a host State: being temporarily unable to work because of illness or accident; certain situations of involuntary unemployment; and entering vocational training. But the Court concluded in *Saint Prix* that Article 7(3) does not '[list] exhaustively the circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status':¹⁹²

The codification...of the instruments of EU law existing prior to [the] directive, *which expressly seeks to facilitate the exercise of the rights of Union citizens to move and reside freely* within the territory of the Member States,

¹⁸⁹ Case 46/12 *N*, EU:C:2013:97, para. 47 (emphasis added).

¹⁹⁰ 'As a derogation from the principle of equal treatment provided for in Article 18 TFEU, of which Article 24(1) of Directive 2004/38 is merely a specific expression, Article 24(2) must, according to the Court's case-law, be interpreted *narrowly and in accordance with the provisions of the Treaty*, including those relating to citizenship of the Union and the free movement of workers' (para. 33, emphasis added); see also, Case C-75/11 *Commission v Austria*, paras 54-56.

¹⁹¹ *Orfanopoulos and Oliveri*, n10 above, para. 50 (emphasis added).

¹⁹² Case C-507/12 *Saint Prix*, EU:C:2014:2007, para. 38.

*cannot, by itself, limit the scope of the concept of worker within the meaning of the FEU Treaty. In that regard...the concept of 'worker', within the meaning of Article 45 TFEU, in so far as it defines the scope of a fundamental freedom provided for by the FEU Treaty, must be interpreted broadly ...*¹⁹³

Applying *Orfanopoulos and Oliveri*, the Court carried over the condition that citizens who cease work because of pregnancy must return to economic activity 'within a reasonable time' to retain the status of worker and thus the security of their residence rights in the host State into the future – requiring an individual-centred assessment.

But what are the implications when these citizens are *between* jobs: Ms Saint Prix retains the *status* of worker, but is she legally resident under Article 7(1)(a) of the Directive even though she is not actually working and may be dependent on social assistance? If she is dependent on social assistance, could the relevant period be counted towards permanent residence? *Ziolkowski and Sjeja* would suggest not, placing limits even on the privileges generated by a starting point of economic activity. If the Court rules otherwise in a future case, deciding that such situations remain should under the shield of Article 7(1)(a), the chasm between categories of citizen will gape further still.

From the perspective of methods of interpretation, the decision in *Saint Prix* confirms that primary rights still make a decisive difference in free movement law: just not, any longer, for all categories of citizen. In *Commission v Netherlands*, AG Sharpston communicated this in terms of the inherent limits of Union citizenship law: 'Directive 2004/38...maintains the distinction between EU citizens who have exercised an economic right of free movement and other EU citizens and *expressly preserves the right of Member States to discriminate for a certain time against the latter*'.¹⁹⁴ In other words, a degree of inequality between categories of citizen is a constituent feature of the free movement rights attached to Union citizenship. However, the Court originally engaged citizenship as a fundamental status to mediate through law

¹⁹³ *Saint Prix*, paras 32-33 (emphasis added); see also, the Opinion of AG Wahl (EU:C:2013:841, paras 29-30 and 45-52), placing particular emphasis on the curbing of State discretion in *Brey*.

¹⁹⁴ Opinion of AG Sharpston in *Commission v Netherlands*, EU:C:2012:79, para. 95 (emphasis added).

between aspiration and reality. And let us not forget a key reason for that: because the *practice* of citizenship in the States has been persistently problematic.¹⁹⁵

4.2. *Less fundamental*

It was shown in Section 3.1.2 that the obligation on host States to extend equal treatment to the nationals of other States was hooked in *Dano* to Article 24(1) of the Directive i.e. ‘all Union citizens and their family members *residing in a Member State on the basis of this Directive* should enjoy...equal treatment with nationals...subject to such *specific provisions as are expressly provided for in the Treaty and secondary law*’. In particular, the Court ruled that citizens who do not comply with the conditions in Article 7(1) could not in turn claim a right of residence in a host State under the Directive. But where citizens can establish a right to reside *outwith* the Directive – under either national or other streams of Union law – do corollary equal treatment obligations then bind host States? Or has the right to move and reside now been hinged *entirely* on the Article 7 requirements?

In *Martínez Sala*, the Court ruled that ‘a citizen of the European Union...lawfully resident in the territory of a host Member State can rely on Article [18 TFEU] in all situations which fall within the scope *ratione materiae* of [Union] law’.¹⁹⁶ The applicant was acknowledged to have a *positive* right to reside in Germany that existed ‘solely by virtue of national legislation’.¹⁹⁷ In *Grzelczyk*, the Court stated that equal treatment for the grant of a subsistence allowance depended on a student being *legally* resident in the host State; noted that Directive 93/96 neither obliged nor precluded the payment of benefits to students; and emphasised individual-centred assessments including consideration of whether financial difficulties were temporary. The Court confirmed that its analysis did not ‘prevent a Member State from taking the view that a student who has recourse to social assistance no longer fulfils the

¹⁹⁵ A constant theme in the Commission’s oversight of the enforcement of citizenship rights: see e.g. Communication on guidance for better transposition n206 above; and *EU Citizenship Report 2010: Dismantling the obstacles to EU citizens’ rights*, COM(2010) 603 final.

¹⁹⁶ *Martínez Sala*, n25 above, para. 63; confirmed in *Grzelczyk*, n2 above, para. 32.

¹⁹⁷ Opinion of AG La Pergola in *Martínez Sala*, n28 above, para. 17.

conditions of his right of residence or from taking measures, within the limits imposed by [Union] law, either to withdraw his residence permit or not to renew it'.¹⁹⁸ But it is not clear if the Court was suggesting that a residence right under EU law might be sustained where an individual did not meet the conditions in legislation in full – as it later said explicitly in *Baumbast* – or whether some positive, rights-ending action was required on the part of the host State.¹⁹⁹

In *Trojani*, the applicant's residence status was more like the circumstances in *Martínez Sala*: he was not economically active and he did not satisfy the requirement to have sufficient resources in Directive 90/364. But 'according to information put before the Court, Mr Trojani is lawfully resident in Belgium, as is attested by the residence permit which has in the meantime been issued to him by the municipal authorities'.²⁰⁰ The Court confirmed that 'while the Member States may make residence of a citizen of the Union who is not economically active conditional on his having sufficient resources, that does not mean that such a person cannot, *during his lawful residence in the host Member State*, benefit from the fundamental principle of equal treatment as laid down in Article [18 TFEU]'.²⁰¹ But note paragraph 43: 'with regard to such benefits, a citizen of the Union who is not economically active may rely on Article [18 TFEU] *where he has been lawfully resident in the host Member State for a certain time* or possesses a residence permit' (emphasis added).

Looking across these judgments, there are different versions of lawful residence in play for citizens who are not economically active *beyond* the rights tied specifically to the 1990s Directives, spanning lawful residence under national law and lawful residence under Union law. It could be suggested that *Dano* did not address the implications of residence rights acquired under national law since the applicant neither possessed a residence permit nor was authorised to reside in Germany,²⁰² and Article 24(1) of the Directive expresses the principle of equal

¹⁹⁸ *Grzelczyk*, para. 42.

¹⁹⁹ The latter argument reflects the submissions of the Commission in *Martínez Sala*; see the Opinion of AG La Pergola, n28 above, para. 15.

²⁰⁰ *Trojani*, n25 above para. 37.

²⁰¹ *Trojani*, para. 39 (emphasis added).

²⁰² For discussion of why the residence 'certificates' that the applicant held do *not* constitute legal residence under German law, see Thym, n128 above, 257-58.

treatment with reference to citizens residing in a host State *on the basis of* the Directive. On one view, that wording allows space for application of the formative case law – of Article 18 TFEU – for citizens residing on a *different* basis. However, because of the compression of equal treatment from Article 18 into Article 24(1) of the Directive, it is not inconceivable that eligibility for social assistance is now implicitly ruled out even where residence is authorised by national law.²⁰³ For those who can link residence rights to other strands of Union law – for example, to Regulation 492/2011 – we saw in Section 3.2 that the conditions set down in Article 7 of the Directive do not apply.²⁰⁴ But that finding does not establish a *positive* right to equal treatment; and eligibility for permanent residence rights – and enhanced protection against expulsion – has been ruled out in these circumstances.

The nature of lawful residence therefore seems to have morphed from a status that could be established in different ways at either Union or national level into a status that must be established *exclusively* through limited elements of Union law – perhaps exclusively in line with the conditions and limits of the Directive. The finding in *Trojani* that ‘a citizen of the Union who is not economically active may rely on Article [18 TFEU] where he has been lawfully resident in the host Member State’ might now therefore be: where he has been lawfully resident in the host Member State *in accordance with Directive 2004/38*. The judgment in *Dias* provides a useful way to explain this. If residence permits are declaratory rather than constitutive of residence rights, a national residence permit is legally empty for the purpose of establishing rights under Union law.²⁰⁵

But noting that Article 15 of the Directive does not permit States to attach a ban on re-entry to expulsion decisions issued ‘on grounds *other than* public policy, public security or public health’ and that, in reality, States progress to expulsion far

²⁰³ ‘To accept that persons *who do not have a right of residence under Directive 2004/38* may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive...namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system’ (*Dano*, para. 74; emphasis added).

²⁰⁴ *Ibrahim*, para. 59 (emphasis added). See further, Verschueren, n89 above, 377-381.

²⁰⁵ That analogy also fits with the Court’s interpretation of Article 37 of the Directive in *Ziolkowski and Szeja*, n5 above, para. 50.

more rarely than migration rhetoric suggests,²⁰⁶ it is essential that we reflect on the citizens in these grey legal spaces – residing in a host State but not necessarily in conformity with Directive 2004/38; possibly residing *unlawfully* though possibly residing *lawfully* under either national law or another strand of Union law; and increasingly beyond the reach of equal treatment protection, permanent residence rights or enhanced protection against expulsion. If these Union citizens can engage in or even commit to engaging in economic activity, their status radically transforms. But it is simplistic to assume that it is always easy or even possible for citizens to effect that change – or at least to effect it by themselves.

To demonstrate the futility of the increasingly splintered citizenship tiers that result, it is instructive to overlay templates from case law on economically active citizens on the circumstances of economically inactive citizens. As discussed in Section 3.1.1, *Brey* required review of each individual's situation precisely to get a sense of his or her circumstances. That approach – underlining temporary difficulties in particular – accommodated a framework of shared responsibility: for citizens to transition towards self-sufficiency, but for the host State to facilitate that transition within reason – to support the citizen 'in' from the outer tiers of citizenship where possible. However, in *Dano*, the situation of the applicant was presented more starkly:

Ms Dano attended school for three years in Romania, but did not obtain any leaving certificate. She understands German orally and can express herself simply in German. On the other hand, she cannot write in German and her ability to read texts in that language is only limited. She has not been trained in a profession and, to date, has not worked in Germany or Romania. Although her ability to work is not in dispute, there is nothing to indicate that she has looked for a job.²⁰⁷

If Germany *chooses* not to deport Ms Dano, is there really no corollary responsibility to support her transition to a different status?²⁰⁸ Exportability case law – where the

²⁰⁶ See Thym, n128 above, on the situation in Germany; more generally, see the national reports in Neergaard, Jacqueson and Holst-Christensen (eds.), n152 above, responses to Q2 and Q3 in particular.

²⁰⁷ *Dano*, para. 39.

²⁰⁸ See also, Verschueren, n89 above, noting that 'the Union's objectives to combat social exclusion, objectives enshrined in provisions such as Article 3(3) TEU, Articles 9 and 151(1) TFEU as well as Article 34(3) of the EU Charter of Fundamental Rights. Articles 1 (Human

impact of primary rights and fundamental status still abounds – provides an insightful comparative touchstone here. In *Stewart*, the Court recognised that ‘[t]he existence of [a genuine link] could effectively be established, in particular, by a finding that the person in question *had been, for a reasonable period, actually present* in that Member State’.²⁰⁹ There are strong parallels between the circumstances of Ms Dano and the criteria then outlined in more detail in *Stewart*, including being connected to the social security system already (Ms Dano received child benefit and maintenance support) and family circumstances (her son was born in the host State and both of them lived there with her sister).²¹⁰ The Breys would find it far harder to demonstrate a similar level of integration in Austria or that the financial shortfall was temporary. Yet in their case, national authorities at least had to consider these factors before taking a final decision. Pushing a State more actively to the action of expulsion obviously produces severe consequences. But not doing so arguably engenders even murkier territory for tolerated citizens, irrespective of the duration for which they are merely left alone. This passive ‘starve them out’²¹¹ strategy will reduce public spending, on both social assistance and the bureaucratic costs of expulsion. But it is the antithesis of responsibility, and a sad point to have reached in the narrative of Union citizenship.

There is thus a frustrating paradox at the heart of free movement: EU law does not care what you *do* if you have sufficient resources – but it does not care what you *have* if you engage in economic activity. The concept of liminality provides a compelling way to reflect on citizens in tolerated, but not supported, in-between situations. Laurie’s work on health research highlights one of liminality’s defining characteristics: it is fundamentally about *transitioning between spaces*, not being stuck.²¹² Otherwise, there is a risk of permanent liminality – of being status-less. That risk is strongly resonant with the recent shift seen across different pockets of the citizenship case law. Conditions and limits have been hardened and generalised to

dignity) and 24 (Children’s rights) 77 of the EU Charter could also play a role in the discussion’ (384; see further, 389-390).

²⁰⁹ *Stewart*, n126 above, para. 93 (emphasis added).

²¹⁰ *Stewart*, paras 97-101.

²¹¹ Thym, n128 above, 260.

²¹² Laurie, ‘Liminality and the limits of law in health research regulation’ (2015) forthcoming.

exclude citizens from equal treatment, permanent residence, and protection against expulsion – in ways that are neither clearly laid down nor provided for, or developed in sympathy with the principles that otherwise characterise the Union legal order. What then is really *left* beyond free movement rights linked to economic activity, which were and still could be protected without any need for a status of Union citizenship at all? Hailbronner is right that ‘[s]o far, there are no indications that the responsibility of Member States for the welfare of their citizens are being replaced by mutual solidarity across the nationals of the Member States’.²¹³ He also argued that ‘[t]he introduction of Union citizenship is not a sufficient explanation for a fundamental reconstruction of social rights of Union citizens’.²¹⁴ But the latter point does not have to connect to the former: there can be *reconstruction* without *replacement*. Furthermore, reconstruction of free movement is a valid consequence of adding citizenship rights at Treaty level: what was the – legal – point of it otherwise?

5. Conclusion

This article has argued that the application and interpretation of the conditions, limits and, to some extent, duties of Union citizenship have shifted to displace established premises of primary rights review. It is not being claimed that free movement rights are – or should be – unlimited; that they are naively cost-free; or that free movement as *one* objective of the Union must always prevail above any other public interest concerns. Conditions, limits and duties have a legitimate place in free movement law. But the wording of Articles 20 and 21 TFEU, which allows for conditions and limits to be prescribed in secondary law, is not a *carte blanche* that exempts national authorities or Union institutions from the obligations inherent in the wider Union legal order. In particular, restrictions of rights must remain subject to the requirements of primary Union law – which includes the Charter of Fundamental Rights as well as the Treaties – and of the general principles of Union law. The Treaty requires that they must be *laid down* and *provided for* – benchmarks

²¹³ Hailbronner, n88 above, 1267.

²¹⁴ *Ibid*, 1266.

that have been disregarded in several cases. The ascent of secondary law as an *exhaustive* expression of equal treatment – when it has typically been precisely the other way around – is a particularly troubling example of mutation that recent case law has provoked. The explanation that Article 24(2) of the Directive limits Article 18 TFEU by way of Article 21 TFEU (and possibly Article 52(2) of the Charter in relevant cases) induces normative migraine and undercuts five decades of understanding equal treatment as a legal principle of autonomous *worth*. The inflation and disruption of secondary legislation in other instances further contributes to the undermining of both aspirational and material claims of citizenship as the fundamental status of Member State nationals.

It would be misleading to claim that the injection of general principles into the framework of judicial review has been acclaimed without criticism. For example, commenting on *Vatsouras and Koupatantze*, Davies argued that ‘while it may seem reasonable that secondary legislation is subject to primary law, it should be remembered that the Treaty says nothing about work-seekers. When the Court speaks of interpreting in the light of Article 45 TFEU, it really means interpreting in the light of the castle of principles and idea that it has built, and which it jealously guards against legislative corruption’.²¹⁵ But it is an inescapable legal fact that the Court, in its scrutiny of both Union and national measures restricting free movement rights, applies a filter of general principles. When that filter is set aside so strikingly, explicit articulation and careful explanation of the constitutional propriety of that decision are *owed* to Union citizens, not to mention the national authorities that must deal with it including the national courts. This is especially the case when previous case law has been apparently but not openly reversed.

It is also critical that members of the Court of Justice ask themselves what it is they have *actually* been responding to in recent case law. It was demonstrated that that what is happening in citizenship law is only partly connected to the balance of

²¹⁵ Davies, n105 above, 1600-01. Judgments preserving the system and character of EU law from undue (as defined by the Court) external interference are perhaps another dimension of the same criticism; see e.g. Case C-402/05 P *Kadi*, EU:C:2008:461; Opinion 1/13 on the draft agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, EU:C:2014:2454.

powers between the legislature and the judiciary, and the rightful sharing of responsibility among all institutions for the shape and direction of the Union's constitution.²¹⁶ O'Brien challenges us to do better than this, emphasising that '[d]eference to the legislature does not make EU citizenship ideologically neutral, or immutable, and it does not discharge the duty of moral scrutiny'.²¹⁷

Law may well be 'the product of the ages wrapped in the opinion of the moment'.²¹⁸ But the dominant opinion of the moment – that most citizens who exercise free movement rights are a burden; and that most citizens who are not economically active have no intention of being so and deliberately abuse Union law – is hardly a representative or well-evidenced truth.²¹⁹ Thym suggests that free movement is performing a 'symbolic function' in public debate at present, 'serv[ing] as a projection sphere for economic, social and political unease about wider globalization processes. If that is correct, the resulting political terrain is difficult to master. Actors involved need to respond to the concerns of the population, while also evading the pitfalls of scapegoating inherent in many policy responses to migratory phenomena'.²²⁰ As Kostakopoulou has cautioned, 'when the space between convictions and principles, on the one hand, and pure power politics, on the other, is left exposed, it is only proper that we keep wondering about the EU citizens' place in this'.²²¹ Who is standing up for Union citizens and for the rights that the Treaty confers on them now?

It is true that Union citizenship was constructed as an asymmetric status more than a categorically fundamental one. It is also true that it is a contested status,

²¹⁶ See e.g. Davies, n130 above, 1586; see generally, Dougan, n67 above.

²¹⁷ O'Brien, n187 above, 1680.

²¹⁸ Moyer CJ, Annual State of the Judiciary Address, Supreme Court of Ohio, 2008, at http://www.supremecourt.ohio.gov/PIO/Speeches/2008/SOJ_091108.asp.

²¹⁹ See e.g. 'A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU migrants to special non-contributory cash benefits and healthcare granted on the basis of residence', 2013, DG Employment, Social Affairs and Inclusion via DG Justice Framework Contract/Final report submitted by ICF GHK in association with Milieu Ltd, at http://www.google.co.uk/url?q=http://ec.europa.eu/social/BlobServlet%3FdocId%3D10972%26langId%3Den&sa=U&ei=6G3jVOrmOpLiaq70gqAI&ved=0CBQQFjAA&usg=AFQjCNFRdV_MtQ8bft3P-dNuSdptyqaiqw.

²²⁰ Thym, n4 above, 21.

²²¹ Kostakopoulou, n66 above, 463.

saturated with expectations that it cannot possibly deliver without fundamental political and societal change. That may never happen. Union citizenship has not transcended political and social contestation at a more fundamental level, and transnational solidarity is a work in painfully slow progress. For now, however, citizenship rights are part of primary EU law, and they were developed and protected in that light. The rights-curbing impulse that dominates recent case law may be understandable. It may be rationally explicable. It may even play a vital part in the preservation of harmonious EU relations overall. But it represents a tainted compromise. States had choices on conditions, limits and duties when adopting Directive 2004/38. If they intend to choose differently now, they should be responsible enough to do so through the legitimate channels of legislative action and Treaty change where needed. The Court should be responsible enough to guard the boundaries of existing primary rights until then. An even more critical question concerns the role of citizens *themselves* in the shaping of Union citizenship. But that merits another story. Meanwhile, 'it would be unfortunate to make citizens bear the consequences of inaction by the [Union] institutions or of the negative attitude of the Member States with regard to the progress of European integration in the field of freedom of movement of persons'.²²²

²²² Opinion of AG Cosmas in *Wijsenbeek*, n21 above, para. 111.